Supreme Court, U.S.
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92-665

No.

# IN THE SUPREME COURT
OF THE
# UNITED STATES

October Term, 1992

Dan O. Davis
*Petitioner,*

vs.

United States of America,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether a person who pays creditors other than the United States with corporate funds acquired after he first becomes aware of the existence of unpaid employment tax obligations acts willfully, within the meaning of 26 U.S.C. § 6672, in circumstances were the person is a "responsible officer" both while the tax liabilities are accruing and afterwards, but has no knowledge that taxes have not been paid until after the applicable quarterly employment taxes and tax returns are due.

2. Whether a taxpayer's request that a penalty assessment pursuant to 26 U.S.C. § 6672 be reduced to the amount of the employer's unpaid trust fund tax liability remaining unpaid after the IRS has applied payments made by the corporation against that liability is the equivalent of a motion for a writ of mandamus, reviewable only for abuse of discretion or an issue of law reviewable de novo.

3. Whether IRS allocation of a taxpayer's non-designated payment to the trust fund portion of the taxpayer's liability satisfies the trust fund liability to which it has been applied *pro tanto*, such that no penalty under 26 U.S.C. § 6672 may be assessed for the amounts which have been satisfied where no reassessment is made within the applicable period of limitations.

## LIST OF PARTIES

The parties to the instant proceedings are Dan O. Davis, petitioner, and the United States of America, respondent. The parties at the District Court for this action were:

*Dan O. Davis v. United States of America, N.D. Cal. 88-20759-RPA (1988)*

| | |
|---|---|
| Plaintiff: | Dan O. Davis |
| Defendant: | United States of America |

There are no other known parties in interest.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on April 14, 1992. (Appendix A hereto) Petitioner filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc which was denied by the Ninth Circuit Court of Appeals on July 15, 1992.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1a) is reported at 961 F.2d 867, 92-1 USTC ¶50,292. The Order of the Ninth Circuit Court of

Appeals denying the petition for rehearing (App. B, *infra*, 28a) is unreported.

The proceeding in the District Court for the Northern District of California is not reported; the District Court's Order denying petitioner's post-trial motion to reduce the fourth quarter tax assessment (App. C, *infra*, 29a) is also unreported.

## JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1a) was filed June 14, 1992, and a timely Petition for Rehearing was timely filed by the Petitioner and was denied on July 15, 1992 (App. B, *infra* 28a). This Court has jurisdiction to review the judgement and opinion of the Court of Appeals pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

## STATUTES INVOLVED

### Title 26, U.S.C. § 6671

26 U.S.C. § 6671 provides, in pertinent part:

> (b) **Person Defined.** -- The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

### Title 26, U.S.C. § 6672

26 U.S.C. § 6672 provides, in pertinent part:

(a) **General rule.** -- Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

## STATEMENT OF THE CASE

Dan O. Davis [hereinafter "Davis"] was at all times material to this case the president and majority shareholder of ITAC Corporation [hereinafter "ITAC"]. During his tenure, and particularly during the fourth quarter of 1981 and the first and second quarters of 1982, ITAC failed to pay over to the United States certain income and social security taxes it had withheld from its employees' wages. Davis asserted that he did not learn of the delinquent taxes until after July 31, 1982, that is, until after the taxes and tax returns for all three quarters were past due. Upon learning of the unpaid taxes Davis caused ITAC to commence a plan to pay its unpaid taxes in installments. Pursuant to this plan ITAC paid several installments, totalling $32,000, towards its delinquent liabilities but failed to satisfy its obligations in full. During this period Davis also caused ITAC to pay other creditors amounts which exceeded the taxes due. In other words, Davis caused ITAC to expend funds it acquired after he first learned of the unpaid taxes in payment of obligations other than the taxes, which could have been paid with such funds.

In the District Court Davis requested that the jury be instructed, inter alia, that his failure to remit ITAC's "after-acquired funds" first to payment of the taxes does not satisfy the statutory requirement of willfulness because (1) the funds that had been withheld from employees' wages prior to and without his knowledge had been dissipated at the time he learned of the unpaid taxes, (2) funds acquired by ITAC after that time ("after-acquired funds") were not subject to any trust in favor of the United States, and (3) he was not under any obligation to subject such non-trust funds to the government. Under Davis' theory he did not breach any statutory obligation, therefore he was not willful.

The District Court rejected Davis' requested instruction, instead giving the following instruction:

> The term "Willfully" means only that the act of failing to collect, account for, or pay over the taxes was done voluntarily, consciously, and intentionally. If Dan O. Davis voluntarily, consciously, and intentionally used the trust funds which were withheld, or caused or allowed them to be used for any other purpose other than the payment of taxes, he is deemed to have acted willfully. . . . The only thing that need be shown is that [Davis] made a deliberate choice to pay other creditors instead of paying the government.

The jury returned its verdict, finding Davis both a responsible person and willful for all three quarters.

Davis filed a post-trial motion to have the assessment against him for the fourth quarter of 1981 [hereinafter "fourth quarter"] reduced to the amount of ITAC's liability which was unpaid, i.e., $2,888.98, as shown by the IRS Certificate of Assessments and

Payments. Davis made the following arguments in support of this motion:

1. The penalty under § 6672 is limited to the amount of the employer's *unpaid* trust fund taxes. According to the IRS' official and certified record the amount of ITAC's unpaid liability for the fourth quarter was $2,888.98. Davis' liability is limited to that amount. While there was evidence that the IRS intended to reallocate some of ITAC's payments from the initial allocation to fourth quarter trust fund taxes to non-trust fund taxes for other periods, presumably in order to maximize potential recovery, the fact is that such reallocation was never actually accomplished.

2. Since ITAC did not make any designation that its payments be applied in any particular manner the IRS was free to credit those payments as it desired. However, Davis argued that once the IRS had made its allocation and credited ITAC's payments to some portion of ITAC's liability that portion was satisfied and extinguished, pro tanto, and the IRS could not thereafter reallocate those payments to different portions of ITAC's debt, for the sole purpose of increasing the potential 100% penalty recovery. Davis also argued that even if the IRS could reallocate payments, the prior credits to the fourth quarter extinguished that liability so that after reallocation the IRS would be required to make a new assessment, which it did not do.

Davis' motion to reduce the fourth quarter assessment was denied by the District Court.

**NINTH CIRCUIT RULING:** Davis filed timely appeal to the Court of Appeals for the Ninth Circuit, which affirmed the District Court in all respects.

**Willfulness:** With respect to willfulness the Ninth Circuit ruled -

> Davis's deliberate decision to use corporate revenues received after July 1982 (when Davis first became aware of the delinquency) to pay commercial creditors rather than to diminish ITAC's tax debt falls within the literal terms of this Circuit's definition of willfulness. The payments were a "voluntary, conscious and intentional act to prefer other creditors over the United States." (Citation omitted).

(App. A, *infra*, 9a). Davis argued that his conduct was not willful under *Slodov v. United States*, 436 U.S. 238, § III(B), 78-1 USTC ¶9447 (1978). He acknowledged that he used corporate funds acquired after he first learned of the unpaid taxes to pay other creditors, but argued that this conduct did not constitute a *willful* violation of any of the duties set forth in the statute as a predicate for liability, i.e., the duties to collect, truthfully account for and pay over[1] *withheld or collected taxes*.[2] Given that Davis had no knowledge of the unpaid taxes until after the returns for the applicable quarterly periods were due, only the failure to "pay over" collected taxes was implicated as the statutory violation supporting the penalty assessment.[3]

**Reallocation of Payments.** Davis argued, and the Ninth Circuit noted (App. A, *infra*, 23a) that the amount of the penalty is equal to the *unpaid* withheld taxes. By his post-trial motion Davis sought a reduction of the assessment to the amount

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[1]*Slodov* holds that liability may be predicated upon failure of a responsible person to do any *one* of these three enumerated acts. *Slodov* at § III(A).

[2]Section 6672 applies "only to collected or withheld taxes which are imposed on some person other than the person who is required to collect, account for and pay over, the tax." *Slodov*, supra, at note 12.

[3]That is, he could not *willfully* have failed to collect or truthfully account for taxes which he was unaware were not being collected or accounted for.

unpaid, as established by the government's own evidence, since that is a limitation on the amount of the penalty. Davis asserts first that no reallocation was ever made by the IRS and the unpaid tax is $2,888.98, and second that "payment" constitutes pro tanto satisfaction and extinguishment of an obligation, and any subsequent reassessment of the paid liability must be made within the applicable period of limitations. The Ninth Circuit held that Davis' post trial motion was in the nature of a writ of mandamus, reviewable for abuse of discretion. Finding there was no abuse of discretion the Court did not address the merits of Davis' contention, and affirmed the District Court's denial of Davis' motion.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S RULING IN *SLODOV V. UNITED STATES* BECAUSE IT EFFECTIVELY IMPOSES A § 7501 TRUST ON AFTER-ACQUIRED FUNDS.

In *Slodov* this Court held that after-acquired funds are not impressed with a § 7501 (26 U.S.C. § 7501) trust. *Slodov*, supra at § III(B)(2). In particular, the Court explained that "§ 7501 properly may be regarded as *informing the scope of the duty imposed by § 6672.*" Id, at note 18 (Emphasis added). Davis did not disburse any funds actually withheld from employees' pay; that had all been dissipated by the time he learned of the tax debts, as had all other corporate funds traceable to periods before Davis learned of the unpaid taxes. The only funds which Davis disbursed were "after-acquired" funds, i.e., funds coming to the corporation after the taxes were due. Under *Slodov* he did not fail, in any manner, to "pay over" any withheld "trust-fund" taxes.

The Ninth Circuit however, considered *Slodov* to mean that "after-acquired funds are not *automatically* impressed with a

trust * * * Rather, some 'nexus between the funds collected and the trust created' must be established." (App A, *infra*, 10a-11a)(Emphasis added). Noting further that "[f]or new management, no such nexus exists," *Id*, it would appear the Court concluded that continuity of management provides the required nexus with the result that after-acquired funds are impressed with a § 7501 trust *if there has not been a change in management.* This conclusion conflicts with *Slodov*.

The discussion in *Slodov* concerning a required nexus between the funds collected and the trust created by § 7501 supported rejection of the government's argument that § 7501 imposed a fiduciary obligation to pay over after-acquired cash *unrelated* to the withholding taxes, and demonstrates that the "trust funds" must be traceable to the taxes withheld. This Court further noted that accepted principles of trust law require tracing of misappropriated trust funds into the trustee's hands for an impressed trust to arise. Nothing in *Slodov* even suggests that status of the putative "trustee" as a "responsible person" could supply the nexus. Davis contends that the Ninth Circuit has erroneously extended § 7501 trust status to after-acquired funds, and imposed upon him a fiduciary obligation to pay over after-acquired cash unrelated to the withholding taxes, a result directly contrary to, and prohibited by, the holding of *Slodov*.

## II. THE PURPOSE OF § 6672, TO ASSURE PAYMENT OF WITHHELD TAXES, WILL NOT BE SERVED OR ADVANCED BY IMPOSING LIABILITY ON CORPORATE MANAGERS WHO UNSUCCESSFULLY UNDERTAKE REHABILITATION AFTER THEY FIRST LEARN OF UNPAID EMPLOYMENT TAXES BECAUSE SUCH A RULE WILL (1) ENCOURAGE PREMATURE CLOSURE OF TROUBLED EMPLOYERS, (2) LEAD TO INCREASED UNEMPLOYMENT, (3) FOSTER RESORT TO THE BANKRUPTCY COURTS, (4) CREATE AN UNWARRANTED DISPARITY IN TREATMENT BETWEEN WELL AD-

**VISED MANAGERS AND THOSE WHO DO NOT HAVE THE BENEFIT OF COMPETENT COUNSEL, AND (5) LEAD TO LIABILITY WITHOUT PERSONAL FAULT. MOREOVER, THE STATUTE'S WILLFULNESS REQUIREMENT IS NEGATED BY THE RULING BELOW.**

The Ninth Circuit also found (App. A, *infra*, 11a-12a) Davis' circumstances specifically excluded from *Slodov's* reasoning by the following passage from *Slodov* -

> *When the same individual or individuals who caused the delinquency in any tax quarter are also the "responsible persons" at the time the Government's efforts to collect from the [corporate] employer have failed, and it seeks recourse against the "responsible employees," there is no question that § 6672 is applicable to them.* It is the situation that arises when there has been a change of control of the employer enterprise, here corporations, prior to the expiration of a tax quarter, or at a time when a tax delinquency for past quarters already exists that creates the question for our decision.

*Slodov*, 436 U.S. at 245-46 (Emphasis by Ninth Circuit; footnote and citation omitted). As aforesaid, Davis did not *cause* the delinquency. While it did accrue "during his watch," it accrued without his knowledge.

The Ninth Circuit recognizes that responsibility is a matter of status, duty and authority, *not knowledge*, *Thibodeau v. United States*, 828 F.2d 1499, 1503 [87-2 USTC ¶9620] (11th Cir. 1987)(per curiam); *Wood v. United States*, 808 F.2d 411, 415 [87-1 USTC ¶9165] (5th Cir. 1987); accord *United States v. Vespe*, 868 F.2d 1328, 1334 [89-1 USTC ¶9193] (3d Cir. 1989). (App. A, infra, 12a)(Emphasis added). Davis does not dispute his

responsible officer status, i.e. responsibility. While the Ninth Circuit pays lip service to the distinction between responsibility ("status, duty and authority") and willfulness ("knowledge"), the Court ignores this very critical distinction in applying the statutory test. Finding Davis willful because subsequent to learning of the unpaid taxes he expended after-acquired funds for purposes other than payment of those taxes confuses the concepts of responsibility and willfulness, and obliterates the distinction between those terms. The result of this confusion is strict liability based on a single standard of *responsibility*, a theory rejected by this Court in *Slodov*, and contrary to § 6672 which requires *both* responsibility and willfulness.

The Ninth Circuit's error is most plainly demonstrated by the following statement -

> The jury found that Davis was a responsible person and, as such, his actions or inactions caused ITAC not to pay over the withheld taxes as required by law. Because Davis was responsible both at the time the taxes went unpaid and at the time the government sought to collect under section 6672, "there is no question that § 6672 is applicable to [him]." *Slodov*, 436 U.S. at 246.

(App. A, *infra*, 12a). Any mention of the statute's "willfulness" requirement is noticeably absent from this language. The statute requires more than merely being "responsible both at the time the taxes went unpaid and at the time the government [seeks] to collect," namely *willful* breach of one of the duties imposed. Inasmuch as *Slodov* requires that the § 7501 trust "informs the scope of the duty under § 6672" and there is no trust impressed on after-acquired funds, it appears that the Ninth Circuit's ruling ignores this requirement and imposes strict liability merely because of his responsible person status. Under this rationale Davis, who happens to have been in a position of

responsibility while the taxes were accruing but who played no role in *causing* the delinquency, has been found liable, notwithstanding the complete lack of personal fault. This result is prohibited by *Slodov*.

In considering *Slodov's* rationale, the Ninth Circuit also considered the following points.

**Evasion of responsibility by management changes prior to end of quarter.** "Corporate roulette" (App. A, *infra*, 14a) will *not* serve to relieve any responsible officer of liability. Generally lack of personal knowledge that employment taxes are not being paid when due is a good defense to willfulness, see *Kalb v. U.S.*, 505 F.2d 506, 74-2 USTC ¶9760, 34 A.F.T.R.2d 74-6104 (2d Cir. 1974) cert. denied 421 U.S. 979; *Moore v. U.S.*, 465 F.2d 514, 72-2 USTC ¶9569, 30 A.F.T.R.2d 75-5242 (5th Cir. 1972) cert. denied 409 U.S. 1108; *Isaac v. U.S.*, 70-2 USTC ¶9541, 36 A.F.T.R.2d 70-5396 (DC Cal 1970); *Wilson, Jr. v. U.S.*, 75-1 USTC ¶9205, 35 A.F.T.R.2d 75-740 (DC Ga 1975); prompt abdication upon learning of unpaid taxes would avoid any § 6672 penalty (absent reckless disregard). The Ninth Circuit was here concerned with the admonition in *Slodov* that changes in officials' responsibilities could lead to evasion of penalties. See 436 U.S. at 247. However, *Slodov's* discussion involved the definition of "responsible person" and was wholly unconcerned with willfulness. The critical fact, overlooked by the Ninth Circuit, is that the statute requires confluence of 2 criteria, viz: status as a responsible person and willfulness. Furthermore, while some person who is technically a "responsible person" might not know taxes are not being paid, in every such case there is some person who will be responsible and willful; that is, someone with authority will knowingly fail to pay the taxes. In the instant case it just so happens that the individual(s) who caused the delinquency have died. That circumstance is not justification to extend the penalty to Davis, who played no part in its cause.

**Choices of existing management.** The Ninth Circuit minimizes existing management's options. The Court correctly observed that the choice to close a business might not be so simple (App. A, *infra*, 14a), however, it is a choice management may make. Another choice, and one which accommodates management's "vested interest * * * in guiding a business through troubled waters" (*Ibid*) is filing for immediate protection under the Bankruptcy Code (Title 11 U.S.C.). Under Chapter 7 the trustee would systematically liquidate the business and distribute the proceeds in accordance with bankruptcy priorities. See 11 U.S.C. § 507. If the corporation had insufficient funds to pay in full all withholding tax liabilities the responsible person who had just learned of the taxes would not willfully have failed to pay any amounts. Likewise, under Chapter 11 the debtor would be prohibited from making payments on pre-petition debts, including accrued employment taxes, until confirmation of a plan of arrangement. Thereafter payments would be those specified in the Plan, which typically would *not* require remittance of all funds coming to the debtor to be applied to the pre-petition taxes; payments to other, non-tax creditors are specified in most Plans. In such circumstances the responsible officer would not be liable under § 6672, notwithstanding that post-petition, i.e., after-acquired, funds are expended for purposes other than payment of pre-petition taxes, because the restrictions imposed by the Bankruptcy Code and the Plan of Arrangement negate willfulness

***Slodov*'s insistence on personal fault.** The Ninth Circuit found personal fault in the following: Davis was president while taxes were accruing; Davis had the authority and responsibility to prevent the tax payment failures but failed to do so; and Davis benefitted in that his salary was paid while taxes were not. (App. A, infra, 15a). According to the Court these facts lend a much stronger foundation for personal fault than in *Slodov*. Personal fault is embodied in the statute's requirement of a willful failure. *Slodov*, supra. Equating responsibility with willfulness negates the second requirement. Duty and authority,

without knowledge, cannot constitute willfulness.[4] And payment of bills and salaries, including Davis', does nothing to indicate personal fault.

In this case a responsible person has been found personally liable for a penalty under § 6672 for amounts an employer failed to pay over to the United States "during his watch" but without his knowledge. The statutory requirement of willfulness is said to be satisfied because after he belatedly learned of the unpaid taxes he attempted, unsuccessfully, to rehabilitate the ailing corporation and in that attempt permitted funds coming to the corporation to be expended for purposes other than payment of the delinquent taxes. It should be recognized that Davis' attempt to rehabilitate, rather than to close, ITAC resulted in the substitution of $32,000 paid to the government for the certain loss which would have followed immediate closure. Davis' "reward" for trying to correct the dereliction of others is getting hammered with a very heavy 100% penalty.

In *Slodov*, supra, this Court ruled that the willfulness requirement of § 6672 denotes Congress' intent to limit imposition of this penalty to those at personal fault. Davis submits that the rulings of the Ninth Circuit, and each of the other appellate courts which have visited this question ignore this requirement and conflict with *Slodov*.

The only factor which distinguishes this case from *Slodov* is that here Davis was responsible during the period the taxes were

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[4] At note 3 (App. A, *infra*, 15a, note 3) the Court suggests that the jury could have disbelieved Davis's claimed lack of knowledge. This ascribes more to the jury than they were given, inasmuch as this question was not presented to the jury. Under the government's theory of this case, as set forth in opening and closing arguments and on brief below, and on the instructions as given, it was sufficient for Davis to be found liable only that he was aware of the taxes at the time he made payments to other creditors. This fact was not disputed. It strains credulity to consider that the jury would make such a difficult factual inquiry and finding when it was not suggested to them and it was wholly unnecessary to the result obtained.

accruing whereas Slodov is generally considered not to have been responsible.[5]

This case presents a very important and commonly recurring question in the administration of the internal revenue laws upon which five circuit courts of appeal (the Ninth Circuit in this case, the Third Circuit in *Vespe v. United States*, 868 F.2d 1328, 63 A.F.T.R.2d 89-837 (3d Cir. 1989); the Fifth Circuit in *Mazo v. United States*, 591 F.2d 1151, 43 A.F.T.R.2d 79-853 (5th Cir. 1976), cert. denied, sub nom, *Lattimore v. United States*, 444 U.S. 842 (1979); the Seventh Circuit in *Garsky v. United States*, 600 F.2d 86, 44 A.F.T.R.2d 79-5111 (7th Cir. 1979); and the Eighth Circuit[6] in *Kizzier v. United States*, 598 F.2d 1128, 44 A.F.T.R.2d 79-5001 (8th Cir 1979)) have erroneously distinguished the principles set forth by this Court in *Slodov* and found responsible persons to be willful because they expended unencumbered funds after they learned of taxes accrued before they acquired knowledge. In addition there are two persuasively

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[5]In fact, although not discussed in the opinion, Slodov was a "responsible person" at the time the taxes became due, and § 6672 liability could have been predicated on his failure to pay over the withheld taxes on the due date. Dr. Slodov assumed his corporate offices on January 31, 1969. The corporations had no funds at that time, and "an outstanding obligation for taxes in the amount of $250,000 *due for payment on January 31*, including withheld employee wage and FICA taxes." Slodov, 42 AFTR 2d at 78-5013 (emphasis added). Quarterly employment tax returns, Forms 941, are due on the last day of the first month after the close of the quarter, Treas. Regs. § 31.6071(a)-1(a), and payment of the taxes shown on such return is due that same day. § 6151. This means that Dr. Slodov was a responsible person on the day the tax return *and payment of the taxes* were due, thus he was a responsible person both before and after the taxes became due. See *Thibodeau v. United States*, 828 F2d 1499, 60 AFTR 2d 87-5763 at 87-5768 (11th Cir. 1987)("When the taxpayer took over as president in January, 1973, the corporation had a pre-existing tax liability for the fourth quarter of 1972 that he was legally required to pay by the end of January, 1973." (fn omitted)). However, Dr. Slodov was found not to be liable because, *inter alia*, he was not at fault for the delinquency.

[6]Petition for Certiorari has been docketed in this Court in *Honey v. United States*, 963 F.2d 1083 (8th Cir. 1992), Petition for Certiorari pending, Supreme Court docket No. 92-460). That case presents this identical issue.

reasoned lower court opinions, in Circuits which have not ruled on this issue, which correctly apply the *Slodov* standards in factually similar cases, *Johnson v. United States*, 663 F.Supp. 294 (D.C. Utah 1987)(appeal would have been to the Tenth Circuit) and *In re Matter of King*, 91-2 USTC ¶50,330 (B.C.N.D. Ala. 1991)(Appeal pending, N.D. Ala)(within the Eleventh Circuit), and which conflict with these circuit court cases.

It should be noted that Certiorari was denied in *Mazo* only a year after this Court's decision in *Slodov*, well before any conflict appeared on this point, and petitions for writ of certiorari were not filed in *Kizzier*, *Garsky* and *Vespe*. No appeal was filed by the government in *Johnson* in the Tenth Circuit.

Finally, in *Slodov* this Court recognized the policy conflict inherent in the need for tax collections vs. the need to rehabilitate financially troubled corporations. If tax collection is exalted at the expense of individuals who try to do the right thing and rectify the failures of other persons to pay required taxes (and probably other creditors as well), and persons in responsible positions within troubled corporations are held to a strict liability standard for failed attempts to rehabilitate, individuals such as Davis will have no choice other than to resign immediately, cease business or file bankruptcy (absent exceptional circumstances where the risk is considered and accepted). Encouraging rehabilitation has the dual benefit of accommodating both of these policies, since rehabilitation increases the government's ultimate possibility of collecting taxes. This is amply demonstrated in this case, where the government received $32,000 more than it would have if ITAC had been closed as soon as Davis learned of the taxes.

Certiorari should be granted in order for the Court to clarify the scope of personal fault embodied by § 6672's willfulness requirement and to provide guidelines for the lower courts in applying that requirement of the statute.

## III. THE FAILURE OF THE NINTH CIRCUIT TO TAKE INTO ACCOUNT THE FACT THAT THE IRS HAS NOT MADE ANY REALLOCATION OF PAYMENTS HAS THE RESULT THAT DAVIS HAS BEEN ASSESSED A PENALTY FOR TAXES WHICH HAVE BEEN PAID BY THE CORPORATE EMPLOYER-TAXPAYER. THIS PENALTY ASSESSMENT IS GREATER THAN THAT PERMITTED BY THE APPLICABLE STATUTE. PROPER COMPUTATION OF THE AMOUNT OF TAX PENALTY LIABILITIES IS A QUESTION WHICH WILL ARISE CONTINUOUSLY AND IS AN ISSUE OF GREAT IMPORTANCE IN ADMINISTRATION OF THE TAX LAWS.

**Standard of Review:** In reviewing the question whether the assessment for the fourth quarter of 1981 should be reduced, the Ninth Circuit first analyzed the standard of review, and held that Davis' appeal should be viewed as an appeal from the denial of mandamus, reviewable for abuse of discretion. The Court opined that Davis sought an "order of mandamus requiring the IRS to return to its original allocation of ITAC's payments." (App. A, *infra*, 23a).

Davis contends that the Ninth Circuit has misapprehended the nature of his request, and erroneously restricted review.

The Ninth Circuit relied on *Skwarlo v. United States*, No. 82-C-500, slip. op. (N.D. Ill. June 25, 1982)(App. D, *infra*, 30a) for the proposition that a request for an order directing the IRS to reverse a reallocation of taxes is tantamount to a motion for writ of mandamus, which is reviewable for abuse of discretion. In *Skwarlo* the taxpayer had filed a 2 count complaint. (See App. D, *infra*, 30a). Count I was a tax refund suit, pursuant to 26 U.S.C. § 7422, in the amount of $52,636.38, claiming this amount had been wrongfully collected by the IRS. In Count II the taxpayer sought mandamus to compel the IRS to allocate a payment to trust fund taxes of the employer-corporation. The

government moved to dismiss Count I on the grounds (1) that Skwarlo's suit was a disguised declaratory judgement action barred by the Declaratory Judgement Act, 28 U.S.C. § 2201, and (2) that the court lacked jurisdiction because of improper venue. The court granted the government's motion to dismiss Count I on the improper venue ground. (App. D, *infra*, 30a)

With respect to the mandamus count, Count II, the government sought dismissal contending that Skwarlo was not entitled to mandamus relief because he could not establish a clear right to the actions he demanded and because he had other adequate remedies, citing *Vishnevsky v United States*, 581 F.2d 1249, 1253, 42 A.F.T.R.2d 78-5681 (7th Cir. 1978). The court dismissed Count II stating -

> *In this case, the mandamus relief sought in count II would provide the same result as the refund request in count I.* Plaintiff's own pleading, then, provides an adequate remedy other than mandamus and, thus, also demonstrates that mandamus relief is unavailable here. *See Terman v. United States of America*, No. 79 C 1742, slip op. at 5-6 (N.D.Ill. Apr. 7, 1980).

(App. D, *infra*, 33a)(Emphasis added). The court did not treat Skwarlo's request for reallocation as a mandamus action; mandamus was specifically pleaded in Count II. Count II was dismissed because Skwarlo had an adequate remedy other than mandamus, i.e., his refund suit pursuant to 26 U.S.C. § 7422, in which the amount of unpaid corporate tax could be ascertained. Skwarlo subsequently filed his § 7422 action in the United States District Court for the Southern District of Florida, which case ultimately was dismissed by joint stipulation of the parties after a settlement had been concluded. (*Skwarlo v. United States*, Civil No. 82-6556-CIV-JAG, S.D.Fla.)(App. F, *infra*, 40a).

In this case Davis does not seek reversal of a reallocation of payments, or any other relief akin to mandamus. This case is a tax refund suit pursuant to 26 U.S.C. § 7422, which is the sole opportunity for adjudication of Davis' liability. Davis seeks an order determining the amount of his liability for the fourth quarter of 1981. This amount must be determined solely with reference to ITAC's unpaid liability for that taxable period, and it cannot exceed ITAC's unpaid trust fund liability. Davis' liability, like that of Mr. Skwarlo, should be determined in this proceeding. To foreclose adjudication on the ground that the relief sought is equivalent to mandamus constitutes denial of any adequate opportunity for meaningful appellate review of the district court's determination of the amount of the penalty assessed against Davis.

Finally, even if some portion of Davis' action is properly treated as a mandamus action the denial of which is to be reviewed for abuse of discretion, he should have been granted de novo review on the merits of the question whether the amount of his liability for the fourth quarter of 1981 has been computed correctly. See *Skwarlo*, (App. D, *infra*, 30a).

Certiorari should be granted because the Ninth Circuit erroneously omitted to review this aspect of Davis' appeal, the fundamental question raised by this case, which is the determination of the correct amount of ITAC's unpaid tax liability for the fourth quarter of 1981.

**The IRS did not make any reallocation of fourth quarter 1981 payments and the unpaid amount for that period is $2,888.98:** It is undisputed that the IRS applied all but one of ITAC's installment payments to the fourth quarter of 1981. The Government's Certificate of Assessments and Payments establishes this fact unequivocally. (R 14, Exh. B-2). Davis also does not dispute that the IRS computed the amount of his penalty *as though it had reallocated the disputed payments*. The fact, however, established by the Government's own evidence,

is that no such reallocation was ever actually made. If any reallocation had been made there would be entries on the Certificate of Assessments and Payments which would show unpaid taxes due from ITAC for the fourth quarter of 1981 of at least $18,848.19, i.e., the amount assessed against Davis for this period. Absence of such entries verifies that they were not made. Accordingly, in point of fact, Davis did not request a "reallocation;" rather he requested that the amount of his penalty be reduced to reflect a liability which is no greater than ITAC's unpaid trust fund taxes.

The consequence of this failure by the IRS to make any reallocation is that ITAC's unpaid trust fund taxes for that period cannot exceed the sum of $2,888.98.[7] In its opinion the Ninth Circuit recognized that "[t]he amount of the penalty [pursuant to § 6672] is mandated by statute to be commensurate with the taxes owed." [App. A, *infra*, 23a]. Because Davis' liability cannot exceed the taxes owed, i.e., $2,888.98, it was not necessary for the Court to address the permissibility of a reallocation which never occurred.

The Ninth Circuit erred in failing to recognize the statutory limitation on the amount of the penalty in this case.

A Writ of Certiorari should be granted on this issue because the facts establish incontrovertibly that the IRS did not reallocate any payments from the fourth quarter to any other tax period. The Ninth Circuit completely omitted from its opinion any mention of this critical factual matter. The result is that Davis has been assessed a penalty for amounts which have actually

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[7]The government's Certificate of Assessments and Payments, CR 14, Exh. B-2, establishes a balance due as of January 4, 1989 of $5,869.97. Of this amount $1,129.25 represents an additional tax assessment (which has not been shown to be trust fund taxes), $230.25 represents a penalty for failure to pay tax, and $1,621.49 represents interest. Of the amount due on January 4, 1989, only $2,888.98 can represent unpaid trust funds.

been paid, which assessment violates the limitation contained in § 6672 that the measure of the penalty is "the amount of the tax * * * not collected, or not accounted for and paid over." Certiorari is necessary in this case to correct a manifest injustice.

## IV. THE DECISION OF THE NINTH CIRCUIT IN THIS CASE IS IN DIRECT CONFLICT WITH PRIOR CASE LAW IN THAT CIRCUIT CONCERNING THE EXTINGUISHING EFFECT OF PAYMENT OF TAX LIABILITIES ON TAX ASSESSMENTS. IT IS NECESSARY FOR THIS COURT TO RESOLVE THIS CONFLICT. FURTHERMORE, THE EFFECT OF PAYMENT UPON TAX ASSESSMENTS AND THE REQUIREMENTS OF REASSESSMENT AFTER PAYMENTS HAVE BEEN REALLOCATED BY THE IRS ARE ISSUES WHICH ARISE FREQUENTLY, WHICH PRESENT IMPORTANT QUESTIONS CONCERNING ADMINISTRATION OF THE TAX LAWS, AND WHICH REQUIRE CLEAR STANDARDS.

Assuming arguendo that the IRS reallocated ITAC's payments from the fourth quarter trust fund liabilities to non-trust fund liabilities for other periods, the elemental question to be answered is the effect of IRS' initial allocation of payments to a particular assessment and the consequence, if any, of reallocation. Davis contends that (1) payment extinguishes an assessment pro tanto, (2) reallocation does not revive an extinguished assessment, and (3) after reallocation IRS may make a new assessment, but the new assessment must be within the applicable statute of limitations.

Applying these principles Davis contends that when the IRS applied ITAC's payments to the fourth quarter, the fourth quarter liability was extinguished *pro tanto* and the amount left unpaid was reduced to $2,888.98. When IRS reallocated the payments to other periods the extinguished portions of the fourth quarter assessment were not revived, and no new as-

sessment against ITAC was made at any time prior to expiration of the statute of limitations. Because of its disposition, none of these matters was addressed by the Ninth Circuit.

The Ninth Circuit has held that payment *extinguishes* an assessment. *Brookhurst, Inc. v. United States*, 931 F.2d 554, 91-1 USTC ¶50,217 (9th Cir.), *cert. denied*, 112 S. Ct. 299 (1991); *Kelley v U.S.*, 30 F.2d 193, 1 USTC ¶357 (9th Cir. 1929). Reallocation of payments does not revive an extinguished assessment, and after reallocation IRS may make a new assessment, but the new assessment must be made within the applicable statute of limitations. *Id*; *U.S. v Young*, 79-2 USTC ¶9609, 44 A.F.T.R.2d 79-5780 (D.C. Del 1979). See also *Carney Coal Co.*, 10 B.T.A. 1397 (1928).

The Ninth Circuit's opinion in this case is inconsistent with that Court's decision in *Brookhurst* and *Young*, supra. Those cases hold that payment of tax liabilities extinguishes the underlying assessment.

In *Brookhurst* the taxpayer duly filed its quarterly employment tax return for the fourth quarter of 1983 reporting a liability of $193,874.76. The reported amount had been paid in full via periodic tax deposits and two other payments. However, the IRS erroneously assessed Brookhurst's liability for that period as $971.82. This resulted in the (erroneous) recording of an overpayment of $193,902.94 (plus interest of $1,908.17) all of which was refunded to the taxpayer on May 10, 1984. A little over two years later, on May 19, 1986, the IRS, having realized its error, entered a new assessment against Brookhurst in the proper amount of $193,902.91[8] Thereafter the IRS collected the total assessed amount, plus all applicable interest and penalties. Brookhurst then filed suit for refund of the taxes so collected.

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[8]The $0.03 discrepancy is not accounted for in the opinion.

Brookhurst argued that the IRS was limited to suit for recovery of erroneous refund, under I.R.C. § 7405(a), which was foreclosed by expiration of the 2 year limitations period on such suits provided in § 6532(b). The government argued that it had properly and timely *reassessed* Brookhurst's liability pursuant to § 6204(a), and thereafter lawfully collected such reassessment.

In *Brookhurst* the Ninth Circuit acknowledged that *Kelley* and *Young* stand for the proposition that once an assessment has been paid it is extinguished. Those cases were not controlling, however, because the issue before the Court in *Brookhurst* was "whether the government may *reassess* a taxpayer's liability, thus creating a new tax obligation." (Emphasis in original). The Court noted that in *Young* the statute of limitations on reassessment had expired and that in *Kelley* reassessment was impermissible because the original assessment was neither imperfect nor incomplete, and held that the government properly reassessed Brookhurst within the applicable limitations period.[9]

In this case the Ninth Circuit distinguished *Brookhurst*, *Young* and *Kelley* on the basis that those cases involved full payment of assessments, whereas ITAC did not fully pay its fourth quarter 1981 assessment here disputed. (App. A, *infra*, 25a, note 4).

This distinction fails to recognize that employment taxes are divisible assessments, each assessment being for the tax withheld from one individual for one tax period. See *Flora v. U.S.*, 362 U.S. 145, notes 37 & 38, 60-1 USTC ¶9347 (1960); *R. M. Steele v. U.S.*, 280 F.2d 89, 60-2 USTC ¶9573 (8th Cir. 1960). Accordingly, each of several assessments has been paid in full, and *Brookhurst*, *Young* and *Kelley* cannot be distinguished on that basis.

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[9]The fourth quarter return for 1983 was deemed filed April 15, 1984, § 6501(b)(2), so the limitations period would not expire until April 15, 1987, well after the reassessment on May 19, 1986.

Moreover, while this case does not involve an erroneous refund, the legal principles concerning "payment as extinguishment" found in *Brookhurst*, *Young* and *Kelley* directly apply and control the result herein. It is undisputed that the IRS applied ITAC's payments to the corporation's liability for the fourth quarter of 1981. (CR 14, Exh. B-2). Pursuant to *Brookhurst*, *Young* and *Kelley* the consequence of this allocation was that the fourth quarter liabilities paid were **extinguished**.

Reallocation by the IRS of some or all of the corporation's payments to other tax periods *does not revive the previously extinguished assessments*. *Brookhurst*, *Young*, *Kelley* and *Carney Coal Co.*, supra. Even if IRS could have reassessed[10] the taxpayer (ITAC) such reassessment is required to be made within the applicable limitations period. *Young*, supra. Accord *Purcella v. U.S.*, 92-1 USTC ¶50,083 (D.C. Colo. 1992). The Certificate of Assessments and Payments (CR 14, Exhibit B-2) incontrovertibly establishes that this was not done.[11]

Accordingly, the facts and the controlling authority establish that ITAC's liability for the fourth quarter of 1981 has been paid, and therefore *extinguished*, except for the unpaid amount of $2,888.98, which is the unpaid "trust fund" liability for which Davis may be assessed under § 6672.

There is no question that the IRS computed Davis' liability as though it had reallocated certain payments which had been

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[10]There being no indication that the original assessment against the corporation was imperfect or incomplete in any manner, under *Kelley* it is questionable whether the IRS could permissibly make any reassessment.

[11]The fourth quarter return was filed no later than September 20, 1982. (R 14, Exhibit B-2, Certificate of Assessments and Payments). Section 6501 imposes a 3 year limitations period within which to make any assessment. The cited exhibit establishes that no other assessment or reassessment of the tax liability has ever been made.

credited to ITAC's fourth quarter liability. This presents the question of law which Davis has advanced from the beginning in this case, i.e., whether the IRS properly computed Davis' liability for the fourth quarter of 1981.[12]

The Ninth Circuit expressed its concern with "straitjacketing" the IRS. (App. A, *infra*, 25a). Davis agrees that the IRS ought not be straitjacketed, and to prevent that result the law provides a mechanism by which the IRS may effect reallocations, viz: to make a new assessment which *creates a new liability*, *Brookhurst*, supra. In the event the IRS deems it necessary or appropriate to reallocate tax payments, e.g., to achieve its goal of maximizing tax revenues, the mechanism of reassessment affords the IRS ample opportunity to preclude any straitjacketing effect. This is substantially the requirement of *Brookhurst*. Davis does not seek to limit the IRS' reallocation authority, but he does seek a declaration of the legal principles which apply when payments are applied by IRS to an assessment and to reassessment when the IRS makes reallocation.

This Court should grant the Petition herein to resolve the inconsistency among the Ninth Circuit's cases, and to take this opportunity to provide definitive guidance to the lower courts, to the IRS, and to taxpayers of the effect of payment upon tax assessments and the requirements of reassessment after payments have been reallocated.

## CONCLUSION

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[12]This is a pure question of law, and should have been reviewed de novo. *McConney v. United States*, 728 F.2d 1195, 1199-1203 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984); *Sliwa v. Comm.*, 839 F.2d 602, 61 AFTR 2d 88-641 (9th Cir. 1988). Even if viewed as a mixed question of law and fact review should have been de novo. Id.

For the reasons set forth above, the Petitioner submits that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully Submitted,

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October 9, 1992

*(Appendices follow)*

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

DAN O. DAVIS,
*Plaintiff-counter-claim-defendant-Appellant,*

v.

UNITED STATES OF AMERICA,
*Defendant-counter-claimant-Appellee.*

No. 90-16209
D.C. No. CV-88-20759-RPA
OPINION

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
October 10, 1991—San Francisco, California

Filed April 14, 1992

Before: Richard H. Chambers, Thomas Tang and Stephen S. Trott, Circuit Judges.

Opinion by Judge Tang

## SUMMARY

### Tax/Income

Affirming a district court judgment upholding a decision of the Internal Revenue Service (IRS), the court of appeals held that while the president and major shareholder of a corporation was a responsible officer liable for the corporation's fail-

ure to pay withholding and social security taxes, his subsequent preference to pay creditors over the government demonstrated "willfulness."

Appellant Dan O. Davis was the sole president and shareholder of a corporation which failed to pay withholding and social security taxes to the IRS. Davis argued that he was not a responsible officer liable for the taxes and that his subsequent decision to pay other creditors with after-acquired corporate funds over the IRS did not show "willfulness." The district court refused to give Davis' instruction to the jury on willfulness. The jury found Davis liable for the employee taxes owed the government. The district court denied Davis' motion to reduce the assessment for a given quarter. Davis argued that the IRS impermissibly allocated corporate tax payments to liabilities that had not yet been assessed and had failed to notify the corporation of how its funds had been allocated.

[1] Davis' deliberate decision to use corporate revenues after he became aware of the tax delinquency to pay commercial creditors rather than diminish the corporate tax debt fell within the literal terms of the Ninth Circuit's definition of willfulness. [2] The court declined to extend *Slodov* to hold that the use of after-acquired funds to pay commercial debts by the same persons who were responsible for the failure to collect and pay the withholding taxes in the first instance (as opposed to new management) does not give rise to liability under the IRC. [3] While Davis argued that he was unaware of the corporation's dereliction until the trust fund taxes were overdue, the district court properly instructed the jury that responsibility is a matter of status, duty, and authority, not knowledge. [4] The court noted that in two previous decisions, it held that the use of after-acquired funds to compensate debtors other than the government amounts to willfulness. [5] In this case, Davis' continuing responsibility before, during, and after the tax delinquency creates the requisite linkage between subsequently received cash and a duty to

satisfy the trust fund tax delinquency. [6] The court found *Johnson* unpersuasive. Neither *Slodov*'s language nor its rational compelled excusing continuing management from the tax liability in question.

[7] If a taxpayer fails to target funds to a specific tax liability, the IRS may apply the payment as it sees fit. [8] Therefore, the court saw no basis for reversing the trial court's decision not to order a reallocation of Davis' taxes. [9] Consequently, the trial court's decision not to reduce the IRS penalty was proper because Davis failed to show actual harm from the reallocation or a failure of the IRS to follow a designation on a voluntary payment.

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## COUNSEL

David M. Kirsch, San Jose, California, for the appellant.

Bruce R. Ellisen, Tax Division, United States Department of Justice, Washington, D.C., for the appellee.

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## OPINION

TANG, Circuit Judge:

Dan Davis, the president and major shareholder of ITAC Corporation, appeals a jury verdict finding him liable for willfully failing to pay withholding and social security taxes for ITAC's employees for the last quarter of 1981 and the first two quarters of 1982. Davis had argued that he was not a responsible officer and that his subsequent preference of other creditors over the Internal Revenue Service ("IRS") did not evince "willfulness." The district court refused to instruct the jury on Davis's definition of willfulness. The jury subsequently found Davis liable for the employee taxes owed the

government. The district court also denied Davis's motion to reduce the assessment for the last quarter of 1981. Davis appeals. We affirm.

## *BACKGROUND*

### A. *Statutory Framework*

The Internal Revenue Code requires employers such as ITAC Corporation ("ITAC") to withhold federal social security and individual income taxes from the wages of their employees. 26 U.S.C. §§ 3102(a), 3402(a).[1] Although an employer collects this money each salary period, payment to the federal government takes place on a quarterly basis. In the interim, the employer holds the collected taxes in trust for the government. 26 U.S.C. § 7501(a). These taxes accordingly are known as "trust fund taxes." *Slodov v. United States*, 436 U.S. 238, 243 (1978). Other taxes, such as those directly owed by the business, are referred to as "non-trust fund taxes."

Once net wages are paid to an employee, the government credits that employee with the tax payments, regardless of whether the taxes are ultimately paid over by the employer. *Id.* In order to protect against revenue losses, the tax code offers the IRS a variety of means of recovering from employers who fail to pay over collected employee taxes. In addition to tax liens, 26 U.S.C. § 6321, and criminal penalties, 26 U.S.C. §§ 7202, 7215, the IRS may assess a civil penalty against responsible corporate officials equal to the amount of delinquent trust fund taxes ("100% penalty"), 26 U.S.C. § 6672. Section 6672 provides, in relevant part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully

[1]References are to the Internal Revenue Code of 1954, as amended, which was the operative code during the years at issue in this case.

> account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

A "person," for purposes of section 6672, includes "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671(b). The recovery of a penalty under section 6672 entails showing that the individual both was a "responsible person" and acted willfully in failing to collect or pay over the withheld taxes. *Maggy v. United States*, 560 F.2d 1372, 1374 (9th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

B. *Factual History*

Dan Davis helped to organize ITAC in the mid-1970s. During the time in question, Davis was ITAC's president, a member of its board of directors, and its major shareholder.

ITAC failed to pay its employees' withheld social security and income taxes during the last quarter of 1981 and the first two quarters of 1982. Davis claims that he did not learn of this default until after July 31, 1982, at which time the payments for all three quarters were past due.

In October 1987, ITAC began paying the delinquent taxes on an installment basis. In the course of making these payments, ITAC never designated to which quarter or liability they should apply, leaving the allocation to the IRS's discretion.

Prior to calculating the 100% penalty against Davis, the IRS learned that no corporate assets were available to satisfy

ITAC's non-trust fund tax liability. This prompted the IRS to reallocate funds originally used to reduce the trust fund tax debt to cover the non-trust fund taxes owed. The IRS contends that this reallocation was necessary to ensure full collection of both trust fund taxes (which can be recovered from either ITAC or a responsible officer) and non-trust fund taxes (generally chargeable only to ITAC).

Upon receiving his section 6672 penalty assessment, Davis paid $100 of the $69,791 penalty and filed a refund suit in federal district court.[2] The government counterclaimed for the remainder of the penalty plus interest and fees.

At trial, Davis contested both his status as a responsible person and the issue of willfulness. With respect to willfulness, Davis argued that he was unaware of ITAC's failure to make the tax payments until the money was overdue and the collected funds held in trust had been completely dissipated. Davis conceded that, after learning of the delict, he made payments to commercial creditors rather than to the IRS. These payments exceeded the amount of taxes due. Davis insists that these facts do not demonstrate willfulness because, under *Slodov v. United States*, 436 U.S. 238 (1978), he had no obligation to use corporate funds acquired after the quarterly payments became due ("after-acquired funds") exclusively to satisfy the IRS obligation.

The district court disagreed with Davis's interpretation of *Slodov*, concluding that the use of after-acquired funds to pay creditors other than the IRS demonstrated willfulness. Accordingly, the district court declined to offer Davis's proposed jury instructions on willfulness, advising the jury instead:

[2]Full payment of the tax is not a jurisdictional prerequisite under the circumstances of this case because the tax due is divisible. *See Flora v. United States*, 362 U.S. 145, 171 n.37, 175 n.38 (1960); *see also* C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3656 (2d ed. 1985).

> The term "Willfully" means only that the act of failing to collect, account for, or pay over the taxes was done voluntarily, consciously, and intentionally. If Dan O. Davis voluntarily, consciously, and intentionally used the trust funds which were withheld, or caused or allowed them to be used for any other purpose other than payment of taxes, he is deemed to have acted willfully. . . . The only thing that need be shown is that [Davis] made a deliberate choice to pay other creditors instead of paying the Government.

On February 22, 1990, the jury returned a verdict finding that Davis was a "responsible person" throughout all three quarters in question and that Davis's failure to pay over the taxes each quarter was willful.

In March 1990, Davis filed a post-trial motion seeking a reduction of the penalty assessed for the fourth quarter of 1981. Davis argued that the effect of the IRS's reallocation of payments originally credited to that quarter was to increase his 100% penalty from $2,888.98 to $18,848.19. Davis contended that, once payments are credited to a specific tax debt, the IRS cannot later reallocate those payments to a different debt. Davis also argued that the IRS impermissibly allocated ITAC payments to liabilities that had not yet been assessed and failed to notify ITAC of how its funds had been allocated. The district court denied the motion for reduction of penalty.

On July 16, 1991, the district court formally entered judgment for the IRS. Davis filed a timely notice of appeal to this court.

## *DISCUSSION*

### I. *The "Willfulness" Instruction*

On appeal, Davis does not challenge the jury's conclusion that he was a "responsible person" during the three quarters

in which trust fund taxes were not paid over to the IRS. Davis argues only that, as a matter of law, he did not act willfully. Davis insists that, because he lacked knowledge of ITAC's failure to pay the taxes until after they were due, his subsequent use of corporate revenues to compensate other creditors rather than to pay the delinquent taxes does not evince willfulness. Davis contends that he deferred payments to the IRS in an attempt to resuscitate ITAC and thereby maximize the chances that the taxes would be repaid in full over time. To hold otherwise, Davis continues, would encourage management to walk away from the corporation or discontinue business upon learning of a back tax liability, rather than expose themselves to personal liability for the tax debt by continuing to pay the corporation's bills.

We review de novo the question whether the district court's jury instructions properly stated the law. *Collins v. City of San Diego*, 841 F.2d 337, 340 (9th Cir. 1988).

We reject Davis's argument as inconsistent with the definition of willfulness promulgated by the Supreme Court and all other courts of appeals presented with the like claim. Davis's theory, moreover, would reward responsible corporate officers for their ignorance and force the federal government to subsidize management efforts to revive private corporations.

A. *Definition of Willfulness*

Willfulness, within the meaning of section 6672, has been defined as a " 'voluntary, conscious and intentional act to prefer other creditors over the United States.' " *Klotz v. United States*, 602 F.2d 920, 923 (9th Cir. 1979) (quoting *Sorenson v. United States*, 521 F.2d 325, 328 (9th Cir. 1975)); *see also Maggy*, 560 F.2d at 1375; *Teel v. United States*, 529 F.2d 903, 905 (9th Cir. 1976). An intent to defraud the government or other bad motive need not be proven. *Klotz*, 602 F.2d at 923. In fact, conduct motivated by a reasonable cause may none-

theless be willful. *Barnett v. United States*, 594 F.2d 219, 221 (9th Cir. 1979).

[1] Davis's deliberate decision to use corporate revenues received after July 1982 (when Davis first became aware of the delinquency) to pay commercial creditors rather than to diminish ITAC's tax debt falls within the literal terms of this Circuit's definition of willfulness. The payments were a "voluntary, conscious and intentional act to prefer other creditors over the United States." *Klotz*, 602 F.2d at 923 (quotation omitted). Indeed, Davis admits that ITAC received sufficient income to satisfy in full its tax delinquency had those funds not been diverted to satisfy other corporate debts.

B. *The* Slodov *Decision*

Davis argues that his actions fall within the exception to section 6672 liability carved out by the Supreme Court in *Slodov*. The Supreme Court held in *Slodov* that, if new management of a corporation assumes control when a delinquency for trust fund taxes already exists and the withheld taxes have already been dissipated by prior management, the new management's use of after-acquired revenues to satisfy creditors other than the United States does not make it personally liable for a section 6672 penalty. 436 U.S. at 259-60.

Mr. Slodov purchased the stock and assumed management of three corporations on January 31, 1969. At that time, the corporations owed $250,000 in unpaid withholding taxes. All of the money withheld from the employees' salaries had been spent by prior management before Slodov assumed control. Indeed, when Mr. Slodov came to the helm, the corporations had absolutely no funds, trust or otherwise, with which to pay the tax debt. Under Mr. Slodov's guidance, the companies acquired sufficient revenue to pay the tax liability, but Mr. Slodov used the money to meet other obligations such as wages, rent, and supplies.

The Supreme Court concluded that Mr. Slodov's actions did not incur personal liability under section 6672.

> [Section] 7501 does not impress a trust on after-acquired funds, and . . . the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time [the responsible person] assumed control there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute.

*Id.* at 259-60 (footnote omitted).

Informing the Supreme Court's decision were three considerations. First, the Supreme Court felt that imposing liability under the circumstances would frustrate the statute's purpose. Section 6672 promotes the full collection of taxes. Confronting potential rescuers of a failing institution with the Hobson's Choice of either assuming personal liability for the back taxes or finding the money to satisfy the tax debt in full before conducting any business actually increases the risk of non-collection. *Id.* at 252-53. Buyers capable of resuscitating the company would be scared off, consigning the business to collapse and the IRS to bankruptcy court to collect its money. Relieving new management from personal liability, on the other hand, would provide the financial breathing room necessary for new officers to get a business back on its feet. Once recovered, the company not only could pay its tax debt, but also could contribute additional tax revenue in the future.

Second, the Supreme Court found the tax code's language and legislative history inconsistent with a penalty theory that imposed "liability without personal fault." *Id.* at 254. After-acquired funds, the Court continued, were not automatically impressed with a trust for the benefit of the government. *Id.*

Rather, some "nexus between the funds collected and the trust created" must be established. *Id.* at 256. For new management, no such nexus exists.

Finally, the Court held that a rule automatically requisitioning all after-acquired cash for the federal Treasury would conflict with the priority rules creating a preferred status for some creditors over federal tax liabilities. *See* 26 U.S.C. § 6323. Responsible persons who paid these preferred creditors before paying back taxes might be deemed liable under section 6672 for diverting funds from the company's trust fund tax repayment obligation. "Surely," the Supreme Court explained, "Congress did not intend § 6672 to hammer the responsible person with the threat of heavy civil and criminal penalties to pay over proceeds in which the [Internal Revenue] Code does not assert a priority interest." 436 U.S. at 259.

[2] Davis would have this court extend *Slodov* to hold that the use of after-acquired funds to pay commercial debts by the same persons who were responsible for the failure to collect and pay the withholding taxes in the first instance (as opposed to new management) does not give rise to liability under section 6672. We decline Davis's invitation for three reasons.

1. Slodov's *language*

First, the *Slodov* opinion specifically excludes from its ambit Davis's situation, limiting its holding to cases involving the accession of new management:

> *When the same individual or individuals who caused the delinquency in any tax quarter are also the "responsible persons" at the time the Government's efforts to collect from the [corporate] employer have failed, and it seeks recourse against the "responsible employees," there is no question that § 6672 is applicable to them.* It is the situation that arises when there has been a change of control of the employer

> enterprise, here corporations, prior to the expiration of a tax quarter, or at a time when a tax delinquency for past quarters already exists that creates the question for our decision.

*Id.* at 245-46 (emphasis added; footnote and citation omitted).

[3] While Davis says that he was unaware of ITAC's dereliction until the trust fund taxes were overdue, the district court properly instructed the jury that responsibility is a matter of status, duty, and authority, not knowledge. *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11th Cir. 1987) (per curiam); *Wood v. United States*, 808 F.2d 411, 415 (5th Cir. 1987); *see also United States v. Vespe*, 868 F.2d 1328, 1334 (3d Cir. 1989). The jury found that Davis was a responsible person and, as such, his actions or inactions caused ITAC not to pay over the withheld taxes as required by law. Because Davis was responsible both at the time the taxes went unpaid and at the time the government sought to collect under section 6672, "there is no question that § 6672 is applicable to [him]." *Slodov*, 436 U.S. at 246.

Davis counters that simply being responsible is not enough. He points out that Mr. Slodov was a corporate officer as of January 31, 1969 — the day that payments for the last quarter of 1968 were due. Status as a responsible person, however, does not attach automatically to every officer engaged in fiscal management on the day the tax check must be written. Rather, liability as a responsible person attaches each time salaries are paid during the course of a quarter. "As the employer withholds taxes from the employees, a contingent liability is created. The liability merely becomes fixed on the date when the payments are due." *Teel*, 529 F.2d at 906; *see Maggy*, 560 F.2d at 1375 (holding that Maggy was a responsible person for that portion of the quarter during which he actually exercised control over corporate disbursements; that Maggy was not technically still a responsible officer on the day payment was due did not expunge his liability for the ear-

lier portion of the quarter); *United States v. De Beradinis*, 395 F. Supp. 944, 951 (D. Conn. 1975) ("The obligation of a responsible officer arises at the time the taxes are withheld from wages, *not* at some subsequent time when payment is due or the return is to be filed."), *aff'd mem.*, 538 F.2d 315 (2d Cir. 1976). Mr. Slodov, unlike Davis, had no role in the corporation at the time the taxes were withheld and salaries disbursed. Nor did the corporation have any funds available with which to pay the tax when Slodov arrived on January 31st.

Davis, by contrast, did not simply appear on the eve of tax payment day. To the contrary, his status and role in the corporation made him a responsible person from the day the first salary was paid in the last quarter of 1981. Moreover, Davis has made no showing that corporate funds did not exist with which to satisfy the tax liability on the payment due date. He contends only that the funds actually withheld had been disbursed by this time. This is insufficient to invoke the protection of *Slodov*.

2. Slodov's *rationale*

Second, the three considerations on which the *Slodov* opinion was predicated do not obtain in this case. Davis claims that, once he learned that ITAC was not paying employees' withholding taxes, he assumed a more active role in supervising corporate disbursements. He contends that the factors animating the *Slodov* decision with respect to new management apply with equal force to the shuffle of duties that took place at ITAC. In other words, Davis would have this court equate transfers of responsibility internal to the corporation with the accession of new management that occurred in *Slodov*. The Supreme Court's analysis, however, will not support such a conclusion.

In *Slodov*, the Supreme Court expressly counselled against interpreting section 6672 in such a manner that "the penalties

easily could be evaded by changes in officials' responsibilities prior to the expiration of any quarter." 436 U.S. at 247. Davis's theory would encourage corporate roulette. Responsible officers, upon learning that taxes had gone unpaid during their watch, could simply rotate their respective responsibilities and duties. Once the officers assumed their new duties, they would be relieved from section 6672 personal liability for the use of forthcoming revenues to pay debts other than the back taxes. The corporation could thus delay compensating the federal treasury for the use of its money indefinitely, thereby freeing up corporate income for more self-interested expenses.

*Slodov*'s concern for encouraging new management to salvage failing businesses, thus maximizing the chances for tax recovery, also loses much of its luster in this context. Persons "contemplating assuming control of a financially beleaguered corporation owing back employment taxes," *Id.* at 252-53, might be deterred by the risk of personal liability. While Davis suggests that he and other responsible officers, just like potential purchasers, have the option of just walking away when they learn of an accrued withholding tax liability, in reality the choice for existing management is not that simple. Existing management has a vested interest, financial and otherwise, in guiding a business through troubled waters. Legal obligations and duties limit an officer's ability to walk away upon learning of an overdue tax liability. Indeed, for "responsible persons," leaving is no guarantee that liability will still not attach. A jury or judge could disbelieve protestations of ignorance or find that the officer acted recklessly or was willfully ignorant of the failure to pay taxes. *See Teel*, 529 F.2d at 905. Existing management like Davis, in other words, has sufficient incentive to remain and to keep the company afloat and capable of repaying taxes without specifically excepting them from section 6672 liability.

*Slodov*'s insistence on personal fault is also satisfied in this case. Unlike Mr. Slodov, Davis presided over the corporation

every day during which taxes were taken from employees' checks and dissipated to satisfy corporate needs, at the expense of the public fisc. The jury found that, throughout these three quarters, Davis had the authority and responsibility to prevent this breach of trust, but failed to do so.[3] While the briefs do not trace the expenditure of the trust funds, Davis at least indirectly benefited from the illicit diversion of the federal government's money. Bills and salaries (including Davis's) were paid and the company kept afloat for three quarters. That might not have been possible without the use of the tax revenues. A much stronger foundation for personal fault thus exists for Davis than for new management like Mr. Slodov.

Concerns about priority rules also have no practical application in this case. Davis has made no showing that any of the creditors he preferred to the IRS held debts given a priority by the tax code. *See* 26 U.S.C. § 6323. We thus leave for another day the question whether section 6672 liability attaches when existing management uses after-acquired funds to pay only debts having priority over a tax lien. With respect to otherwise unencumbered corporate income, the obligation to repay the taxes remains intact.

Finally, it should be noted that *Slodov* was concerned with the situation where, when new management assumes control, the business has no funds at all available to alleviate its tax debt. While Davis points out that the trust funds were dissipated prior to the time he learned of the delict, he makes no showing that "there were no funds with which to satisfy the tax obligation." 436 U.S. at 259-60. It is unclear from the Supreme Court's opinion how critical a factor the impoverishment of the business is, other than that the total unavailability of cash and liquid assets makes the revival of the business

[3]For all the verdict shows, the jury might also have disbelieved Davis's claimed lack of knowledge and found that he was aware of and acquiesced in the failure to pay over withholding taxes throughout the three quarters.

through commercial expenditures much more urgent and the threat that the IRS will be unable to collect due to a bankruptcy much more immediate. To the extent ITAC was in a more solvent financial condition, it had less of an excuse to prefer commercial creditors over the IRS.

3. *Circuit court decisions*

[4] The third reason we refuse to extend *Slodov* to Davis's situation is that Davis's proposed interpretation of *Slodov* has been implicitly foreclosed by two of our previous decisions and expressly rejected by four other federal courts of appeals. In two decisions pre-dating *Slodov*, we held that the use of after-acquired funds to compensate debtors other than the United States amounts to willfulness. In *Teel*, the responsible corporate officers first learned of the business's failure to pay on October 17, 1966. After October 17th, the same officers knowingly used incoming cash to purchase new merchandise. The Ninth Circuit observed:

> The [purchase] agreement seems sensible and honest. But the trouble is that as the cash went into the cash drawer, it became subject to trust or lien in favor of the federal government for the unpaid withholding taxes. By dissipating the cash for new purchases, of which the taxpayers knew, they unwittingly supplied the necessary willfulness. Because the failure to pay the arrearages and current tax after October 17, 1966, was willful, any factual issue as to ignorance of nonpayment prior to October 17, 1966, is not material.

529 F.2d at 905-06.

Likewise in *Maggy*, we held that a responsible officer's failure to use funds received by the business to repay its tax liability constituted willfulness because "the funds which came into the corporation became immediately subject to a

trust or lien in favor of the United States for the unpaid withholding taxes." 560 F.2d at 1375-76.

Davis attempts to distinguish these cases on two grounds. He argues firstly that *Teel*'s and *Maggy*'s reliance on a trust fund theory is outmoded in light of *Slodov*'s admonition that "[n]othing whatever in § 6672 . . . suggests that the effect of the requirement to 'pay over' was to impress a trust on the corporation's after-acquired cash." 436 U.S. at 254.

While *Slodov* might quarrel with some of *Teel*'s and *Maggy*'s phraseology, we nevertheless consider our previous opinions' analyses sound and their bottom-line conclusions consistent with *Slodov*. Applying the appellation "trust" to *Teel*'s and *Maggy*'s after-acquired funds was simply a shorthand acknowledgment of the obligations section 6672 imposes on persons who (unlike *Slodov*) are responsible when the taxes are collected, when the funds are dissipated, and when subsequent corporate income is diverted to creditors other than the United States. *Slodov* recognizes this distinction when, at the outset of its opinion, the Supreme Court contrasts Slodov's circumstances with the situation where the same corporate officers who prefer other creditors to the federal treasury were responsible before, during, and after dissipation of the withheld taxes. 436 U.S. at 245-46. In the latter case, the Supreme Court said "there is no question that § 6672 is applicable to them." *Id.* at 246; *see also Mazo v. United States*, 591 F.2d 1151, 1154 (5th Cir.) (*Slodov* "implicitly affirms [*Teel*'s and *Maggy*'s] conclusions because the [Supreme] Court assumes at the outset that a penalty may be exacted from a person who was responsible both during the period withholding tax liability accrued and thereafter"), *cert. denied*, 444 U.S. 842 (1979).

[5] Moreover, the Supreme Court's concern with imposing a trust on all after-acquired funds under all circumstances was that such a theory gave insufficient heed to the necessary nexus between the payment obligation and the after-acquired

funds. *See Slodov*, 436 U.S. at 256. In Davis's case, his continuing responsibility before, during, and after the tax delinquency creates the requisite linkage between subsequently received cash and a duty to satisfy the trust fund tax delinquency.

Davis also tries to sidestep *Teel* and *Maggy* by pointing out that the responsible officers there learned of the tax delinquency before the actual payment due date and thus were under an absolute obligation to use any and all corporate funds to pay the taxes on time. Davis insists that he remained in the dark until after the money was due. Assuming the jury believed Davis's claim of ignorance, Davis still fails to explain why this timing factor should be critical. What is key in *Teel* and *Maggy* is that (1) the officers were in responsible positions at the time the taxes were or should have been collected and at the time trust moneys were dissipated, and (2) they ignored their obligations as responsible officers, knowingly and willfully diverting after-acquired cash to commercial creditors instead of paying the United States. Like *Teel* and *Maggy*, Davis's status and authority throughout the quarters, not his state of mind, made him a responsible person. As in *Maggy* and *Teel*, Davis's actions after he learned of the tax debt are what constituted willfulness. The arrival of a payment date, after all, does not by itself impose liability. It simply marks the fruition of liability — that is, responsibility — accumulated throughout the quarter as salaries were paid and/or trust funds dissipated. *See Maggy*, 560 F.2d at 1375; *Teel*, 529 F.2d at 906; *De Beradinis*, 395 F. Supp. at 951. Similarly, a person may still be deemed responsible for a quarter's tax payment even if she no longer holds a responsible position when the payment date arrives. *See Slodov*, 436 U.S. at 247; *Brown v. United States*, 591 F.2d 1136, 1140 (5th Cir. 1979).

Numerous federal courts of appeals have followed *Teel*'s and *Maggy*'s holdings in the post-*Slodov* era, specifically rejecting in the process the argument Davis now proffers. In *Mazo*, the Fifth Circuit refused to extend *Slodov* to cases

"[w]here there has been no change in [corporate] control." 591 F.2d at 1154. The Fifth Circuit emphasized that the Supreme Court specifically limited *Slodov* to the expenditure of funds acquired after new management's " 'accession to control.' " *Id.* (quoting *Slodov*, 436 U.S. at 259). Concluding that neither *Slodov*'s language nor its rationale applied to continuing management, the Fifth Circuit held:

> In the case of individuals who are responsible persons both before and after withholding tax liability accrues, as the appellants were in this case, there is a duty to use unencumbered funds acquired after the withholding obligation becomes payable to satisfy that obligation; failure to do so when there is knowledge of the liability, as was the case here, constitutes willfulness.

591 F.2d at 1157; *see also Wood*, 808 F.2d at 415-16 ("Because ... Wood was a responsible person both before and after the obligations at issue accrued, *Slodov* is not applicable," even though Wood assumed new job responsibilities upon learning of the tax deficiency).

All of the other circuits presented with Davis's argument unanimously have limited *Slodov* to changes in management control. Quick on *Mazo*'s heels came the Eighth Circuit's opinion in *Kizzier v. United States*, 598 F.2d 1128 (8th Cir. 1979), holding:

> Although Kizzier did not become aware of Titan's 1973 tax delinquency until March 1974, he was a responsible person within the meaning of section 6672 through all the calendar quarters. Titan failed to pay over employment taxes to the Government. As such, Kizzier's responsibility to pay Titan's withheld employment taxes extended to unencumbered funds received by the corporation after Kizzier learned of Titan's tax delinquency.

*Id.* at 1134.

The Seventh Circuit followed suit:

> *Slodov* does not relieve a "responsible person" of the responsibility to reduce accrued withholding tax liability with funds acquired after the funds actually withheld have been dissipated so long as the person responsible has been so throughout the period the withholding tax liability accrued and thereafter.

*Garsky v. United States*, 600 F.2d 86, 91 (7th Cir. 1979); *see also Purdy Co. v. United States*, 814 F.2d 1183, 1188 (7th Cir. 1987).

The Third Circuit rounded out the circle in *Vespe*:

> One who was a responsible person when taxes were incurred, and who only later becomes aware that they were not paid, acts willfully by then paying other creditors in preference to the United States, even if the money specifically withheld has been dissipated.

868 F.2d at 1335; *see also id.* at 1334 n.7; *cf. Thibodeau*, 828 F.2d at 1506 (preferring other creditors over the United States prior to payment due date demonstrates willfulness); *Caterino v. United States*, 794 F.2d 1, 6 (1st Cir. 1986) ("Any responsible person who knows the taxes are not paid and allows the business to pay other creditors acts willfully."), *cert. denied*, 480 U.S. 905 (1987).

C. *The* Johnson *Decision*

As an answer to the weight of authority rejecting his position, Davis offers *Johnson v. Commissioner*, 663 F. Supp. 294 (D. Utah 1987), a case that apparently no other court has followed. In *Johnson*, the district court tracked the argument

Davis makes here and extended *Slodov* to corporate officers who, although responsible, did not actually know of the tax diversion until after the fact.

> [P]enalties cannot be imposed upon [responsible officers] based upon their payment of corporate creditors with cash acquired after they learned of failures to pay tax withholdings, so long as the responsible person did not play a "willful" role in that failure.

*Id.* at 299 (footnote omitted).

[6] We find *Johnson* unpersuasive. As noted earlier, contrary to the *Johnson* court's holding, neither *Slodov*'s language nor its rationale compels excusing continuing management from liability under section 6672.

The *Johnson* approach, moreover, focuses too heavily on corporate officers' actual knowledge, effectively creating two tiers of responsible persons. The first tier consists of corporate officials like Johnson and Davis who meet all of the traditional criteria for responsible status, but who do not knowingly play a role in the failure to collect, or the dissipation of, withholding taxes. The second tier would be those with responsibility *plus* actual participation in the loss of the trust funds — that is, "a person who was responsible throughout the period [and] *also* acted 'willfully' during that period of time." *Johnson*, 663 F. Supp. at 298. This scheme is inconsistent with our prior articulations of the responsibility test. *See Teel*, 529 F.2d at 905.

Furthermore, *Johnson* ignores the purpose of section 6672, which is to make the federal treasury whole and to encourage diligent compliance with the withholding rules by all those in a position to regulate a corporation's collection and disbursement of money. *See United States v. Graham*, 309 F.2d 210, 212 (9th Cir. 1962) ("The statute's purpose is to permit the

taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing."). The *Johnson* approach undercuts this goal by rewarding officers for their ignorance. Davis would be a responsible officer in name only. Although found to have been in a position to prevent ITAC's tax delinquency, Davis would face no sanctions. To the contrary, *Johnson* would permit Davis to continue (as did the officers who actually dissipated the trust funds) to subordinate the public fisc to the corporation's private interests. Despite his responsibility for damage to the federal treasury, *Johnson* would allow Davis to continue to divert funds from the government to other commercial expenses he deems more worthy of the corporate dollar.

In the meantime, the federal government's interest in corporate revenues is held hostage to the continued success of the business. The federal government is in effect subsidizing the corporation's recovery by foregoing collectible tax dollars. Numerous courts have admonished against such interpretations of section 6672. *See, e.g., Thibodeau*, 828 F.2d at 1506 ("[T]he government cannot be made an unwilling partner in a business experiencing financial difficulties."); *Mazo*, 591 F.2d at 1154 ("[T]he United States may not be made an unwilling joint venturer in the corporate enterprise.").

In sum, we eschew adopting the *Johnson* theory of responsibility without consequences. Instead, we join the Third, Fifth, Seventh, and Eighth Circuits in refusing to extend *Slodov* to cases where the responsible officer presided over both the initial loss of the trust funds and the subsequent diversion of after-acquired revenues and hold that the district court properly instructed the jury on willfulness. To hold otherwise would ignore *Slodov*'s plain language and analytical foundations, as well as frustrate the remedial and deterrent purposes of section 6672.

## II. *Reallocation of Tax Payments*

Davis argues alternatively that, if he is liable for some penalty, his assessment for the last quarter of 1981 was improp-

erly inflated by the IRS's reallocation of payments from the 1981 trust fund tax debt to non-trust fund tax liabilities.

At the outset, we are confronted with the question of what standard of review to apply to the district court's refusal to reduce the 1981 assessment. The government characterizes this as a question of law to be reviewed de novo, although the cases it cites neither establish a standard of review nor involve the issue on appeal here. *See Burnet v. Harmel*, 287 U.S. 103, 110 (1932); *Muntwyler v. United States*, 703 F.2d 1030, 1032 (7th Cir. 1983).

At least one district court has treated a request for an order directing the IRS to reverse a reallocation of taxes as a motion for a writ of mandamus directing the IRS to undo the reallocation. *Skwarlo v. United States*, No. 82-C-500, slip op. (N.D. Ill. June 25, 1982).

We agree with the *Skwarlo* court and hold that Davis's argument should be treated as an appeal from the denial of mandamus, which is reviewable for an abuse of discretion. *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). Such a standard of review recognizes the IRS's general authority to allocate as it sees fit undesignated payments. *See Muntwyler*, 703 F.2d at 1032. The district court, after all, does not make the allocations or reallocations. The amount of the penalty is mandated by statute to be commensurate with the taxes owed. Thus, only when the tax debt itself changes can the 100% penalty amount be reduced. What Davis effectively seeks is an order of mandamus requiring the IRS to return to its original allocation of ITAC's payments.

[7] The parties do not dispute that this was a voluntary payment — that is, a payment not made pursuant to judicial or administrative order. *United States v. Technical Knockout Graphics, Inc. (In re Technical Knockout Graphics, Inc.)*, 833 F.2d 797, 802 (9th Cir. 1987). When a taxpayer submits a voluntary payment, she may designate to which liability the

money should be applied. *Id.* at 799; *Muntwyler*, 703 F.2d at 1032. If the taxpayer fails to target the funds to a specific liability, the IRS may apply the payment as it sees fit. *Wood*, 808 F.2d at 416; *Muntwyler*, 703 F.2d at 1032.

IRS policy is to credit undesignated payments first to non-trust fund liabilities and only secondly to trust fund liabilities. This practice "has been previously blessed by a multitude of courts." *United States v. Schroeder*, 900 F.2d 1144, 1149 (7th Cir. 1990); *accord Liddon v. United States*, 448 F.2d 509, 513 (5th Cir. 1971) (IRS may apply undesignated payments to debt with greatest risk of non-collection), *cert. denied*, 406 U.S. 918 (1972).

Few courts have addressed the IRS's authority to reallocate payments, as it did here, in light of new information or changed circumstances affecting debt collectibility. We have previously condoned a reallocation that reduced a taxpayer's section 6672 liability. *Mattingly v. United States*, 939 F.2d 816, 819-20 (9th Cir. 1991). A bankruptcy court has specifically approved the reallocation of involuntary bankruptcy payments to non-trust fund taxes. *Neier v. United States*, 127 B.R. 669, 674 (D. Kan. 1991). Involuntary payments, like undesignated payments, may be credited as the IRS desires. *Muntwyler*, 703 F.2d at 1032. One other district court, in dicta, summarily dismissed a challenge to an IRS reallocation:

> It may be, as plaintiffs assert, that the proceeds of the checks were applied first to Dav-el's trust fund obligation and later reallocated to Dav-el's non-trust fund obligation. It is material that the money is now allocated to the non-trust fund obligation. . . . It is immaterial whether a prior allocation was made to the trust fund obligation.

*Ellis v. United States*, 87-2 U.S. Tax Cas. (CCH) 9418, at 89,159 n.1 (W.D. Wis. 1987).

[8] We find no basis for reversing the district court's decision not to order a reallocation of Davis's taxes. To the contrary, we find three significant problems with Davis's position.

First, Davis's attempted employment of state debtor/creditor law to define how undesignated payments should be treated raises the specter of a plethora of different rules and requirements governing IRS treatment of undesignated payments. The Supreme Court has expressly warned against creating a checkerboard of federal tax law. *Burnet*, 287 U.S. at 110. State law will be incorporated as a part of the federal taxing scheme "only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Id.* Davis has made no such showing in this case.

Second, straitjacketing the IRS into its initial allocation decisions would be inconsistent with the goal of maximizing tax revenues.

> The defendant claims that the United States has failed to apply funds received by it in such a way as to relieve him of the responsible officer assessment against him. This charge is not denied, in fact for the Commissioner of Internal Revenue to have done otherwise would have been to shirk his responsibility to insure that the maximum amount of assessed tax be collected.

*De Beradinis*, 395 F. Supp. at 952. Adjustments of allocations should be permitted as new information comes to the IRS.[4]

[4]We need not decide whether limits on the IRS's reallocation authority would be appropriate where the taxpayer's voluntary payment completely satisfies an existing tax liability, as opposed to simply reducing it. *Cf. Brookhurst, Inc. v. United States*, 931 F.2d 554, 556 (9th Cir.), *cert. denied*, 112 S. Ct. 299 (1991); *Kelley v. United States*, 30 F.2d 193, 193-94 (9th Cir. 1929).

Third, Davis has made no showing that he was injured by the reallocation or that he detrimentally relied on the original allocation. Davis concedes that, had the IRS originally allocated the payments along their current lines, his penalty would have been identical to what it now is. The reallocation thus has not increased his penalty beyond that for which he was eligible in the first instance.

Davis, moreover, would be hard-pressed to demonstrate detrimental reliance. He made no effort to designate ITAC's payments, thereby waiving any interest in how the IRS allocated the money. As an experienced business person, he should have been aware of the IRS policy to target undesignated payments to non-trust fund taxes first.

[9] Given the lack of actual injury, the dangers of incorporating state law, and the need to preserve IRS flexibility, we refuse to tie the IRS's hands in the manner advocated by Davis. We therefore affirm the district court's denial of Davis's motion for reduction of penalty.[5] While perhaps a different rule will apply in cases where the taxpayer can show actual harm from the reallocation or a failure of the IRS to follow a designation on a voluntary payment, this is not such a case.[6]

## *CONCLUSION*

We affirm the district court's instructions on willfulness as consistent with *Slodov*. To hold otherwise (i) would be con-

[5]Davis also objects that some payments were impermissibly credited to non-mature debts. As the government points out, however, sufficient mature non-trust fund debts existed to support reallocation and to result in the same 100% penalty. An order for reallocation would thus result in only a paper shuffle, with no real benefit accruing to Davis.

[6]Davis's motion to strike the government's brief as untimely filed is denied. The government is admonished, however, to adhere strictly to filing deadlines set by this court in the future. Davis's request for attorney's fees is also denied.

trary to *Slodov*'s language and rationale, (ii) would undermine this circuit's opinions in *Teel* and *Maggy*, (iii) would place this circuit in conflict with at least four other federal courts of appeals, and (iv) would frustrate section 6672's purpose. With respect to the IRS's reallocation of ITAC payments, we affirm the denial of reduction due to Davis's failure to demonstrate injury, detrimental reliance, or diligence in designating the payments in the first instance.

AFFIRMED.

**APPENDIX B**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| DAN O. DAVIS,<br><br>Plaintiff-counter-claim-defendant-Appellant,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant-counter-claimant-Appellee. | No. 90-16209<br><br>DC No. CV-88-20759-RPA<br><br>ORDER |

BEFORE: CHAMBERS, TANG and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**APPENDIX C**

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| DAN O. DAVIS,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | No. C-88-20759-RPA<br><br>ORDER RE: PLAINTIFF'S POST TRIAL MOTION TO REDUCE THE FOURTH QUARTER ASSESSMENT |

The court has considered the papers submitted in support of and in opposition to plaintiff's motion to reduce the fourth quarter assessment and concludes that good cause has not been shown.

Plaintiff's motion is hereby denied.

Date: 26 June 1990

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
SENIOR UNITED STATES DISTRICT JUDGE

## APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| EDWARD SKWARLO,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA, ET AL.,<br><br>Defendants. | 82 C 500 |

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter is before the court on defendants' motion to dismiss and plaintiff's motion for preliminary injunction.[1] For the reasons stated below, the motion to dismiss is granted.

As alleged in the complaint, plaintiff was president of ElecPac, Inc. ("ElecPac") from February 1969 to October 1979. ElecPac defaulted on some payments of federal income and social security taxes that it withheld from its employee's wages. The corporation also failed to pay certain Federal Unemployment Act taxes. The total indebtedness of

[1] Because of the court's disposition of defendants' motion to dismiss, plaintiff's motion for preliminary injunction will not be addressed.

ElecPac amounted to $125,794.11 on October 17, 1979. After ceasing operations and selling its assets, ElecPac voluntarily paid $52,348.21 to the Internal Revenue Service ("IRS"). This payment was made with the direction that it be paid toward the trust fund potion of the taxes due. The IRS originally followed this direction, but it later reallocated the funds to the non-trust fund portion of the taxes due from ElecPac. The IRS then assessed plaintiff the full amount of the original trust fund portion of the tax liability. This assessment was made pursuant to 26 U.S.C. § 6672 on the premise that plaintiff was a "controlling person" of ElecPac.

After an unsuccessful claim for refund from the IRS, plaintiff filed this two count complaint. In the first count, plaintiff seeks a refund pursuant to 26 U.S.C. § 7422, in the amount of $52,636.38, claiming this amount was wrongfully collected. In count II, plaintiff seeks a mandamus compelling the individual defendants to allocate the payment of $52,348.41 to the trust fund portion of ElecPac's tax liability. The defendants have moved to dismiss the complaint. As to count I, defendants contend that plaintiff is actually seeking a declaratory judgment as to the proper allocation of the tax payment. This type of relief, defendants submit, is barred by the Declaratory Judgment Act, 28 U.S.C. § 2201. With respect to count II, defendants argue that plaintiff is not entitled to mandamus relief because he cannot establish a clear right to the actions he demands and because plaintiff has other adequate remedies. The defendants also orally moved to dismiss the action for improper venue. At a recent status hearing, defendants' counsel stated that he had just learned that plaintiff does not reside in this district and did not reside here when the lawsuit was filed. Because plaintiff's residence is not in this district, defendants contend that the case must be dismissed under 28 U.S.C. § 1402.

In response to the motion to dismiss for improper venue, plaintiff argues three positions. First, he submits that defendants have waived their right to contest venue because they waited over four months to raise the issue and did not

include the matter in the original written motion to dismiss. Second, plaintiff argues that even if venue is improper here under 28 U.S.C. § 1402, that section applies to plaintiff's first count for a tax refund under 26 U.S.C. § 7422 and 28 U.S.C. § 1361(a). Thus, plaintiff maintains that venue is proper here as to count II and the court should have concurrent jurisdiction for count I. Finally, plaintiff argues that under the doctrine of forum non conveniens, venue is proper in this district. In response to defendants' contentions with respect to mandamus relief, plaintiff perfunctorily states that he has a clear right to demand the action he seeks and that he has no other adequate remedy.[2]

Under 28 U.S.C. § 1346(a)(1), federal district courts have original jurisdiction of any action against the United States for the recovery of taxes alleged to have been erroneously or illegally collected by the IRS. The venue for such an action is limited by 28 U.S.C. § 1402(a)(1), which provides: "Any civil action against the United States under subsection (1) of section 1346 of this title may be prosecuted only: (1). . . in the judicial district where the plaintiff resides; . . . ." Applying this provision to this case, it is clear that venue is improper here for count I. Plaintiff concedes that he did not reside in this district when suit was filed and he does not reside here now. Further, the venue statute provides no discretionary exceptions for the convenience of parties or witnesses and it has been interpreted to preclude such exceptions. *Caleshu v. Wangelin*, 549 F.2d 93 (8th Cir. 1977). Thus, if defendants have not waived the defense of improper venue, count I must be dismissed. The defendants' oral motion with respect to venue was essentially an amendment to its original motion which had not been ruled upon. Indeed, the oral motion was made only eleven days after plaintiff filed his response to defendants' original motion. Under these

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[2] Plaintiff also argues that count I is a properly pleaded tax refund cause of action, but the court need not address that issue in light of the disposition of the venue issue.

circumstances, the court concludes that defendants have not waived their right, under Fed. R. Civ. P. 12 (h)(1),[3] to assert improper venue. *See Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1340-41 & n.8 (9th Cir. 1976).

To prevail on a claim for mandamus relief, the plaintiff must establish that he has a clear right to demand the performance by the defendants of a plainly defined, preemptory and ministerial duty and plaintiff must establish that he lacks an adequate remedy other than mandamus. *Vishnevsky v. United States*, 581 F.2d 1249, 1253 (7th Cir. 1978). In this case, the mandamus relief sought in count II would provide the same result as the refund request in count I. Plaintiff's own pleading, then, provides an adequate remedy other than mandamus and, thus, also demonstrates that mandamus relief is unavailable here. *See Terman v. United States of America*, No. 79 C 1742, slip op. at 5-6 (N.D. Ill. Apr. 7, 1980).

Accordingly, defendants' motion is dismiss is granted.

/s/ Joel M. Flaum
UNITED STATES
DISTRICT JUDGE

DATED: [MONTH ILLEGIBLE] 25, 1982

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[3] Rule 12(h)(1), Fed. R. Civ. P., provides:

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA
FORT LAUDERDALE DIVISION

| | |
|---|---|
| EDWARD SKWARLO,<br>Plaintiff,<br>v.<br>UNITED STATES OF AMERICA, et al.,<br>Defendants. | Civil No. 82-6556-CIV-JAG |

JOINT STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED that the above-styled action be and is dismissed, with prejudice, pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure, each party to bear its own costs including attorney's fees.

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Supreme Court, U.S.
FILED
DEC. 16 1992
OFFICE OF THE CLERK

No. 92-665

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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DAN O. DAVIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

KENNETH W. STARR
*Solicitor General*

JAMES A. BRUTON
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## QUESTIONS PRESENTED

1. Whether a corporate president charged with the responsibility under Section 6672 of the Internal Revenue Code of collecting, accounting for and paying over to the United States income and social security taxes withheld from the wages of the corporation's employees is personally liable for the corporation's unpaid employment taxes when, after becoming aware of the corporation's employment tax delinquency, he continues to disburse funds from the company's accounts to satisfy the claims of other creditors.

2. Whether the Internal Revenue Service properly applied amounts paid by the corporation to the corporation's employment tax liabilities.

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# In the Supreme Court of the United States

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No. 92-665

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 961 F.2d 867. The opinion of the district court (Pet. App. 30a-33a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 14, 1992. The petition for rehearing was denied on July 15, 1992. Pet. App. 28a. The petition for a writ of certiorari was filed on October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner organized ITAC Corporation and was its president, a member of its board of directors, and its major shareholder (Pet. App. 5a). ITAC failed to make timely payments to the United States of the income and social security taxes that it withheld from its employees' wages (the trust fund tax liability) for the fourth quarter of 1981 and the first and second quarters of 1982 (*ibid.*). ITAC also failed to pay over the employer's share of the social security taxes (the non-trust fund tax liability) (*id.* at 5a-6a). When ITAC thereafter made installment payments on the delinquent amounts, it did not designate the quarter or the liability to which the payments were to be applied (*id.* at 5a).

The Internal Revenue Service initially elected to allocate these payments to ITAC's 1981 trust fund tax liability (Pet. App. 6a). When the Service learned that there were no corporate assets available to satisfy ITAC's non-trust fund tax liability, however, the Service then reallocated ITAC's payments from the 1981 trust fund tax debt to the non-trust fund tax liabilities (*ibid.*). In this manner, the Service sought to enhance the government's ability to collect the full amount of the unpaid taxes (*ibid.*).

On December 3, 1985, the Service assessed against petitioner a "penalty" under Section 6672 of the Internal Revenue Code, 26 U.S.C. 6672, in an amount equal to the taxes that had been withheld from ITAC's employees' wages that had not been paid over to the government (the trust fund taxes) for the fourth quarter of 1981 and the first and second quarters of 1982 ($69,791.32) (Pet. App. 6a; Gov't C.A.

Br. 3). The Service determined that petitioner was a person responsible for seeing that ITAC paid over its withholding taxes to the government for the quarters assessed and that he willfully failed to do so (*ibid.*).

2. Petitioner paid part of the amount assessed against him under Section 6672 and sued for a refund (Pet. App. 6a). The United States counterclaimed against petitioner for the remaining amount assessed under Section 6672, plus interest and fees (*ibid.*).

At trial, petitioner maintained that he did not know of the corporation's failure to pay the taxes to the government until after the tax return was due and the withheld funds had been dissipated (Pet. App. 6a). Petitioner conceded, however, that, after learning of the unpaid tax liabilities, he made payments to commercial creditors, rather than to the government, using funds acquired by ITAC after the withheld funds had been dissipated (*ibid.*). These payments exceeded the amount of the taxes due (*ibid.*). Petitioner claimed, however, that, under *Slodov* v. *United States*, 436 U.S. 238 (1978), the jury should be instructed that, if a responsible officer does not learn of the corporation's tax delinquency until after the return for a particular quarter is due, he has not "willfully" failed to pay over the taxes even though he uses funds acquired after the withholding obligation becomes due to pay other creditors (Pet. App. 6a). The court disagreed with petitioner's interpretation of *Slodov* and refused to give the proposed jury instructions (*ibid.*). The court instead instructed the jury that petitioner could not, with knowledge of the unpaid taxes, use after-acquired funds to pay other creditors (*id.* at 6a-7a).

Following trial, the jury found that petitioner was a responsible person who had willfully failed to collect, account for, and pay over the withholding taxes of ITAC for each of the quarters in issue (Pet. App. 7a). The penalty assessment against petitioner under Section 6672 was therefore upheld.

3. On March 7, 1990, petitioner filed a post-trial motion seeking to reduce the assessment for the fourth quarter of 1981 (Pet. App. 7a). Petitioner argued that the Service could not reallocate the payments initially allocated to the non-trust fund taxes due for the fourth quarter of 1981 to ITAC's trust fund tax liability (*ibid.*). Alternatively, petitioner claimed that no effective application of the payments had occurred because the Service did not notify him of the manner of application. Petitioner therefore asserted that the payments must be applied to the earliest debts first—to the trust-fund liability for the fourth quarter of 1981 (*ibid.*).

The district court denied petitioner's motion (Pet. App. 29a) and entered judgment against petitioner in accordance with the jury's verdict.

4. The court of appeals affirmed (Pet. App. 1a-27a). On appeal, petitioner did not contest the determination that he was a "responsible person" during the three quarters in issue (*id.* at 7a-8a). Petitioner claimed instead that, as a matter of law, he did not act willfully, as Section 6672 requires (Pet. App. 8a). The court of appeals rejected that contention. The court held that petitioner's deliberate decision after he became aware of the withholding tax delinquency to use corporate funds to pay commercial creditors, rather than to pay the corporate tax debt, constituted

a willful failure to pay the taxes owed (*id.* at 8a-9a). Such payments represented a "voluntary, conscious and intentional act to prefer other creditors over the United States" (*id.* at 9a, quoting *Klotz* v. *United States*, 602 F.2d 920, 923 (9th Cir. 1979)). The court of appeals held that this Court's decision in *Slodov* is not applicable to the situation this case presents, where the persons who were responsible for the failure to collect and pay the withholding taxes in the *first* instance (as opposed to new management) used after-acquired corporate funds to pay the claims of other creditors (Pet. App. 11a).

The court of appeals also upheld the district court's decision not to reduce the Section 6672 penalty by the amount of the tax payments the Service initially allocated to the corporation's non-trust fund tax liability. The court adopted and applied the settled rule that, when a taxpayer fails to specify that funds must be applied to a specific tax liability, the Service may apply the payment in any manner it chooses (Pet. App. 24a). The court also noted that petitioner had failed to demonstrate that he had suffered any detrimental reliance from the Service's allocation of these payments (*id.* at 26a-27a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 6672(a) of the Code, when a person responsible "to collect, truthfully account for, and pay over" withholding taxes "willfully" fails to do so, he is liable for a "penalty" equal to the amount of

the unpaid taxes. 26 U.S.C. 6672(a). Petitioner did not contest the jury's finding that he was "responsible" for collecting and paying over withheld taxes during the periods at issue in this case. As the court of appeals correctly concluded (Pet. App. 9a), a responsible person "willfully" fails to pay over withholding taxes when he permits the corporation's funds to be paid to other creditors with knowledge that the withholding taxes have not been paid over to the government. Petitioner's deliberate decision to use corporate revenues to pay commercial creditors, rather than to pay the corporation's withholding tax debt, constituted a "willful" failure to pay those taxes under the consistent decisions of the courts of appeals. See, *e.g.*, *Honey* v. *United States*, 963 F.2d 1083, 1087-1089 (8th Cir. 1992), cert. denied, No. 92-460 (Dec. 7, 1992); *Smith* v. *United States*, 894 F.2d 1549, 1553-1554 (11th Cir. 1990); *United States* v. *Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989); *Thibodeau* v. *United States*, 828 F.2d 1499, 1505-1506 (11th Cir. 1987); *Wood* v. *United States*, 808 F.2d 411, 415-416 (5th Cir. 1987); *Garsky* v. *United States*, 600 F.2d 86, 90-91 (7th Cir. 1979); *Maggy* v. *United States*, 560 F.2d 1372, 1375-1376 (9th Cir. 1977); *Kizzier* v. *United States*, 598 F.2d 1128, 1133-1134 (8th Cir. 1979); *Mazo* v. *United States*, 591 F.2d 1151, 1157 (5th Cir.), cert. denied, 444 U.S. 842 (1979); *Teel* v. *United States*, 529 F.2d 903, 905 (9th Cir. 1976).[1]

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[1] Willfulness may also be established by a reckless disregard of the obligation to make withholding tax payments. *Wood* v. *United States*, 808 F.2d 411, 415 (5th Cir. 1987) (a responsible person acts willfully by proceeding with a "reckless disregard of a known or obvious risk that trust funds may not be remitted

2. There is no merit to petitioner's contention (Pet. 7-8) that these consistent decisions of the courts of appeals conflict with this Court's decision in *Slodov* v. *United States*, *supra*. In *Slodov*, the Court addressed the situation of an individual who becomes responsible for a corporation's withholding taxes *after* prior management (i) has used the funds represented by those taxes to pay other creditors and (ii) has left the corporation with no unencumbered funds with which to pay the taxes owed to the United States. In these circumstances, the Court held that the newly responsible individual is obligated to use funds that subsequently come into the corporation's possession to satisfy the prior tax delinquency only when the after-acquired funds are directly traceable to the dissipated trust fund taxes. 436 U.S. at 259-260.

Unlike the situation in *Slodov*, petitioner was at all times responsible for collecting and paying over the corporation's trust fund taxes. He was therefore under a continuing duty to apply all unencumbered funds received by the corporation to satisfy the withholding tax obligations. His failure to do so constituted a willful failure to carry out his duties to the United States, thereby making him liable for the unpaid taxes under Section 6672. Nothing in *Slodov* supports petitioner's claim that an individual who *is* a responsible person when the withholding tax obligation accrued has no duty to use funds acquired by the corporation afterwards to satisfy the unpaid tax

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to the government"); *Mazo* v. *United States*, 591 F.2d at 1154. The district court so instructed the jury (Tr. 15-16), and the jury's verdict may well have rested on a factual determination that petitioner acted with such reckless disregard.

liability. As the Seventh Circuit stated in *Garsky* v. *United States*, 600 F.2d at 91:

> *Slodov* does not relieve a "responsible person" of the responsiblity to reduce accrued withholding tax liability with funds acquired after the funds actually withheld have been dissipated so long as the person responsible has been so throughout the period the withholding tax liability accrued and thereafter.

Accord, *e.g.*, *Honey* v. *United States*, 963 F.2d at 1088-1089; *Kizzier* v. *United States*, 598 F.2d at 1134; *Mazo* v. *United States*, 591 F.2d at 1154.

3. Petitioner errs in contending (Pet. 10-11) that the court of appeals confused the concepts of responsibility and willfulness. The court of appeals observed that petitioner was a "responsible person" before, during, and after the withheld taxes were dissipated to satisfy corporate needs, and that he at all times had the authority and responsibility to prevent this breach of trust, but failed to do so. The separate element of willfulness was established by petitioner's deliberate decision to prefer other creditors to the United States once he was aware of the outstanding withholding tax liability (Pet. App. 12a-15a). Petitioner's "actions after he learned of the tax debt are what constituted willfulness" (*id.* at 18a).

4. Petitioner contends (Pet. 11-15) that the tax collection objective that underlies Section 6672 will not be served by imposing liability on corporate managers who unsuccessfully undertake rehabilitation after they first learn of unpaid employment taxes. That contention, with which we disagree, should be addressed to Congress, not to the courts.

In any event, as the court of appeals pointed out, under the "penalty" provisions of Section 6672, "[e]xisting management has a vested interest, financial and otherwise, in guiding a business through troubled waters. Legal obligations and duties limit an officer's ability to walk away upon learning of an overdue tax liability" (Pet. App. 14a). Section 6672 imposes continuing payment obligations on responsible persons precisely so that corporate officers cannot frustrate their payment obligations simply by rotating their corporate responsibilities. Congress did not intend to leave the collection of withholding tax payments to an evasive scheme of official "corporate roulette" (Pet. App. 14a).

5. The court of appeals correctly upheld the district court's refusal to reduce the 1981 assessment for unpaid trust fund taxes.[2] It is undisputed that ITAC had not designated any of its late payments toward any particular portion of its outstanding tax liability. In the absence of such a designation by the taxpayer, it is well established that the Service may

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[2] Petitioner contends (Pet. 16) that the court of appeals erroneously characterized his appeal on this issue as an appeal from the denial of mandamus and erroneously restricted review to an abuse of discretion standard, instead of applying a *de novo* review. Petitioner has not shown that there is any conflict in the federal courts of appeals regarding the standard of review on this issue. Moreover, the court of appeals not only determined that there was no basis for reversing the district court's decision, but further indicated three significant problems with petitioner's position, detailing why petitioner was not entitled to the relief he had requested. It is thus evident that the decision in this case would have been the same even if a *de novo* standard of review had been applied.

apply any voluntary payment it receives to any outstanding tax liability of the taxpayer. *Muntwyler* v. *United States*, 703 F.2d 1030, 1032 (7th Cir. 1983); *Liddon* v. *United States*, 448 F.2d 509, 513 (5th Cir. 1971), cert. denied, 406 U.S. 918 (1972); Rev. Rul. 79-284, 1979-2 C.B. 83; Policy Statement P-5-60, [1 Administration] Internal Revenue Manual (CCH) at 1305-14 (approved May 30, 1984); cf. *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990).[3] The court of appeals agreed that the Service was justified in its ultimate allocation of the late payments in this case, noting that "straitjacketing the [Service] into its initial allocation decisions would be inconsistent with the goal of maximizing tax revenues" (Pet. App. 25a). The court also correctly observed (*id.* at 26a) that petitioner had failed to establish that he had relied to his detriment in any manner on the initial allocation.

Petitioner also errs in contending (Pet. 20-24) that the decision in this case conflicts with the court of appeals' prior decision in *Brookhurst, Inc.* v. *United States*, 931 F.2d 554 (9th Cir.), cert. denied, 112 S. Ct. 299 (1991). *Brookhurst* did not address the effect of a reallocation of an employment tax payment. It involved the Service's ability to reassess a liability

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[3] Petitioner contends (Pet. 18-19) that the Service never in fact reallocated the late payments because the reallocation is not reflected in the Certificate of Assessments and Payments. This factual contention was decided adversely to petitioner in the district court. That determination was not clearly erroneous, for the Form 4183, 100-Percent Penalty Data, submitted into evidence by the government (CR 25, Exh. 1 at 4) clearly shows the reallocation of the payments.

that was concededly no longer subject to assessment. As the court of appeals indicated in distinguishing *Brookhurst* in its decision in this case (Pet. App. 25a n.4), that issue is not involved here. Moreover, even if an intra-circuit conflict existed, that would afford no basis for further review in this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992

Supreme Court, U.S.
FILED
DEC. 31 1992
CLERK

No. 92-665

# IN THE SUPREME COURT
OF THE
# UNITED STATES

October Term, 1992

Dan O. Davis
*Petitioner,*

vs.

United States of America,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**REPLY BRIEF FOR THE PETITIONER**

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*Davis v. United States*, 961 F.2d 867 (9th Cir. 1992) ..... 8

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*Kizzier v. United States*, 598 F.2d 1128 (8th Cir. 1979) .. 2, 8

*Mazo v. United States*, 591 F.2d 1151 (5th Cir. 1976), cert. denied, sub nom, *Lattimore v. United States*, 444 U.S. 842 (1979) ..... 2, 8

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*United States v. Wilkes*, 946 F.2d 1143 (5th Cir. 1991) ... 6, 9

*Vespe v. United States*, 868 F.2d 1328 (3d Cir. 1989) .... 2, 8

*World Marketing, Ltd v. Hallam*, 608 F.2d 392 (9th Cir. 1979) ..... 5

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

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No. 92-665

Dan O. Davis,
*Petitioner,*

vs.

United States of America,
*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONER

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## ARGUMENT

1. In order for liability to attach under section 6672, the two requirements set forth in the statute must be met: (1) one must be a responsible person and (2) one must "willfully" fail to meet the statutory obligations - to withhold, truthfully account for and pay over the withheld taxes. Davis does not contest that he was a responsible person. However, he contends that his conduct does not violate the statutory duties, as construed by this Court

in *Slodov v. United States*, 436 U.S. 238, 78-1 USTC ¶9447 (1978).

The only fact which distinguishes Davis from the taxpayer in *Slodov* is that Davis was a responsible officer while the taxes were accruing, whereas Slodov was not. This fact is not germane to the pronouncements in *Slodov* that section 6672 does not impose liability without fault, and that section 7501 does not impose a trust on after acquired funds.

The consequence of the result in this case, if upheld, is that one who is technically a responsible person, but who has no actual knowledge that taxes are not being paid on time, and perforce has played no part in their non-payment, will have an *absolute duty* to pay all funds coming to the corporation after he learns of the unpaid taxes to payment of those taxes. Failure to do so will subject such a person to various consequences, including potential criminal liability, see *Slodov*, 436 U.S. at 253, 259, 26 U.S.C. §§ 7201, 7202, and certain personal liability for all unpaid withholding taxes under § 6672.

Davis recognizes that every Circuit Court that has addressed this question has ruled in favor of the United States, and that this Court has denied certiorari in two of such cases. *Honey v. United States*, 963 F.2d 1083, 1087-1089 (8th Cir. 1992), cert. denied, No. 92-460 (Dec. 7, 1992); *Thibodeau v. United States*, 828 F.2d 1499, 1505-1506 (11th Cir. 1987); *Vespe v. United States*, 868 F.2d 1328, 1335 (3d Cir. 1989); *Garsky v. United States*, 600 F.2d 86, 90-91 (7th Cir. 1979); *Kizzier v. United States*, 598 F.2d 1128, 1133-1134 (8th Cir. 1979); *Mazo v. United States*, 591 F.2d 1151, 1157 (5th Cir. 1976), cert. denied, sub nom, *Lattimore v. United States*, 444 U.S. 842 (1979), and the Ninth Circuit in this case.

This unanimous alignment notwithstanding, Congress could not possibly have intended to force persons in this circumstance to choose among attempting to rehabilitate the corporation and subjecting themselves to these Draconian consequences,

resigning their positions[1] or relegating the corporation to bankruptcy.[2]

The Ninth Circuit opined that existing management may be under certain limitations on its abilities to "walk away upon learning of an overdue tax liability." (Pet. App. 14a). No authority is cited for this proposition. Businesses fail and close their doors every day. Management may be subjected to some liabilities, but those liabilities are very different from that imposed under § 6672; most significantly, claims must be brought by an aggrieved party, who must then prove its case, and any liabilities are most likely dischargeable in a personal bankruptcy. Given these choices most well advised, hard-nosed business persons would choose to close the business and risk the potential claims that may be made, as opposed to the certain 100% penalty liability if the rehabilitation fails. This rationale wholly ignores the safety net of bankruptcy protection. If the business is worth saving, the well advised manager will have no choice but to file a bankruptcy case.

The Ninth Circuit's logic that "leaving is no guarantee that liability will not still attach [because] [a] judge or jury could disbelieve protestations of ignorance or find that the officer acted recklessly or was willfully ignorant of the failure to pay taxes," (*Id.*) also misses the mark, because under those circumstances all the facts which establish liability under § 6672

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[1]Davis recognizes that reckless disregard is a substitute for willfulness. There was no such finding in this case, and although the United States contends that the jury's verdict could have rested on such a determination (Br. Opp. at 6, note 1), the facts in this case make it clear that such was not the case. (See Pet. C.A. Rep. Br. at 6-13). However, under the government's theory recklessness is irrelevant, because the mere act of committing funds to other creditors after learning of the unpaid taxes constitutes willfulness; no resort to a reckless disregard analysis is needed. Moreover, if a person has acted with reckless disregard, resignation will not avoid the penalty.

[2]An immediate filing under chapter 7 or 11, 11 U.S.C., will insulate a person from 100% penalty liability, because after filing no funds may be expended for pre-petition debts without bankruptcy court approval.

have already occurred; nothing can be done to avoid liability. That is not a reason to hold liable one who was not reckless and who really did not know of the taxes.

The concern that "corporate roulette" may facilitate evasion also misses the mark. Resignation does not relieve from liability a responsible person who is otherwise liable for the 100% penalty.[3] Rather, the question is whether those who are not otherwise liable, e.g., because without knowledge of the unpaid taxes they have not acted willfully, subject themselves to liability by undertaking to rescue the financially troubled corporation.[4] We agree that "Congress did not intend to leave the collection of withholding tax payments to an evasive scheme of official 'corporate roulette.' (Pet. App. 14a)." (Br. Opp. at 9). However, Congress did not intend to hammer those who did not participate in the corporate derelictions with heavy civil and criminal penalties merely because they try to correct the situation by rehabilitating the corporation, and even facilitating substantial payments to the IRS which it would not otherwise receive, as in this case. In this respect this case is indistinguishable from *Slodov*. No taxes are evaded and no person is relieved from liability. Rather, the net of liability is drawn around another person, whose only "fault" is attempting to save the corporation from extinction. The rule of this case merely affords the government another pocket into which to reach for payment.

Moreover, Congress could not have intended to force upon managers, who belatedly learn of unpaid taxes, a requirement

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[3]The real problem faced by the government in this case is that the persons who were responsible for ITAC's failure to pay its employment taxes have both died. This circumstance simply does not justify extension of penalty liability to one who did not violate any duty addressed by § 6672.

[4]The officer should have an opportunity to have the jury decide this question. Under the government's theory of this case, however, the question is never put to the jury, because subsequent payment of other creditors renders the officer *absolutely liable*.

which virtually guarantees that the corporation will fail. Imposition of an absolute duty to commit all funds henceforth acquired by the corporation to payment of the accrued taxes mandates that there will not be any funds remaining with which to operate. Wages, suppliers, rent and every other operating expense cannot be paid without violating this duty. Recovery and survival are impossible for a corporation with no funds available for operations. Thus, satisfying the obligation which the Ninth Circuit has said is imposed by § 6672 will invariably result in failure of the corporate employer. The fisc does not require such a result, and a magnanimous sovereign would not demand it. See *World Marketing, Ltd v. Hallam*, 608 F.2d 392, 395 (9th Cir. 1979).

The purpose of the statute is to facilitate collection of taxes, not to force failure on troubled corporations. This purpose will be frustrated, not furthered, by imposition of absolute liability on managers whose attempts to rehabilitate financially troubled corporations do not succeed. Any manager who is aware that he must choose between satisfying the obligation to pay all funds available to the government and watching the corporation die, or continuing operations at his own peril, including possible criminal prosecution, will have no practical alternative other than immediately to cease operations or file for bankruptcy protection.[5] The purpose of the statute will be advanced by encouraging knowledgeable managers to try to rehabilitate the distressed corporation. As in this case, it is likely that the IRS will receive payments on the delinquent taxes during the attempted rehabilitation. If successful the statutory purpose will be fulfilled, as the taxes will be paid. If unsuccessful, the 100% penalty may still be assessed against those who were at fault for the unpaid taxes. However, the person who was not willful

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[5]One other possibility does exist, and that would be to arrange a quick sale to an outside, third party. This new owner would, of course, have no personal liability if the taxes are not paid. *Slodov*, supra. But why should the business owner have to resort to this form over substance technique, when he is the most knowledgeable person with the best chance to rescue the business?

before the attempt to salvage the business must not be turned into a "willful" actor by the adoption of the government's theory.

2. The government and the court of appeals in this case have misconstrued Davis' contention that the fourth quarter of 1981 assessment should be reduced, by treating it as a request to reallocate payments. Rather, Davis agrees that the IRS properly allocated ITAC's undesignated payments as it chose. See *Muntwyler v. United States*, 703 F.2d 1030, 1032 (7th Cir. 1983). The point of disagreement is the effect of such an allocation on the assessment to which it has been applied. Davis contends that the effect is *extinguishment* of the assessment, pro tanto. (Pet. 20-24). While the IRS may be free to reallocate such payments, the assessment so paid remains extinguished unless and until the IRS makes a new assessment. Indisputably, this was not done. (CR 14, Exhibit B-2, Certificate of Assessments and Payments).

Moreover, there is a split between the circuits on the question whether partial payment extinguishes an assessment pro tanto. The Ninth Circuit, in this case, has ruled it does not (Pet. at 25a, note 4);[6] the Fifth Circuit has ruled that it does. *United States v. Wilkes*, 946 F.2d 1143, 1150-1152 (5th Cir. 1991). In *Wilkes*, an estate paid $16,025.47 against an assessment of $16,243.58. The IRS made a posting error, and refunded this payment to the taxpayer. Subsequently the IRS brought suit to

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[6]However, this decision appears inconsistent with that court's prior decision in *Brookhurst, Inc. v. United States*, 931 F.2d 554 (9th Cir.), cert. denied 112 S. Ct. 299 (1991). In this regard the government errs in stating (Br. Opp. at 10) that *Brookhurst* does not address the effect of reallocation of a tax payment. The reason the IRS could not reassess the liability in that case was precisely because it had been extinguished by the prior payments, and the erroneous refund did not revive the assessment. At the time the IRS discovered its mistake, it was too late to make a new assessment. The significance of *Brookhurst* is the principal that payment extinguishes an assessment. The payment having been extinguished, the IRS was required to make a new assessment in order either to collect it from ITAC or assess a 100% penalty with respect thereto against Davis.

reduce an unpaid assessment to judgement. The Fifth Circuit held that the taxpayer's partial payment extinguished the assessment to the extent of the payment, and that the only avenues available to the IRS were to file timely suit for erroneous refund or to make a new assessment for the amount refunded. Because the IRS could not at that time have done either, judgement was rendered in favor of the IRS in the amount of $218.11, the *unpaid* balance of the assessment.

The government also errs in contending (Br. Opp. at 10, note 3) that the District Court decided the question whether any reallocation was in fact made adversely to Davis. The government avers that this alleged determination was not clearly erroneous, relying on Form 4183, 100-Percent Penalty Data (CR 25, Exhibit 1 at 4).

First, the District Court made no factual determinations in its Order (CR 26), which recited only that good cause had not been shown.

Second, any such factual determination is clearly erroneous. The government's Certificate of Assessments and Payments ((CR 14, Exhibit B-2) is a certified record, and is presumptively correct. The government contended below (Br. C.A. at 28, note 8) that the "Form 4183 demonstrates that notations regarding the reallocation were inadvertently omitted." This contention was raised for the first time on appeal, and it is significant that the Ninth Circuit made no references to the question whether any reallocation was actually made. Furthermore, no evidence was produced by the government to support the contention that any data was omitted from the Certificate of Assessments and Payments. If the government intended to impeach its certified record, it should have notified Davis of its intention, which it did not, and it should have produced evidence to support its contention, which it also failed to do. In these circumstances any determination that the IRS made reallocations, not reflected on its Certificate of Assessments and Payments, is clearly erroneous.

## CONCLUSION

This Court has recognized that § 6672 does not impose liability without personal fault. *Slodov*, 436 U.S. at 254. Davis was not personally responsible for ITAC's failure to withhold taxes; he was not even aware of any such failure. Neither was he aware, until after the fact, that ITAC had not met its obligation to remit the withheld taxes to the government. All Davis did, after he learned of the unpaid taxes, was to continue operations and facilitate ITAC's payment of $35,000 to the IRS. ITAC failed. The withheld funds having been dissipated beforehand, ITAC's after-acquired funds were not impressed with a § 7501 trust. *Slodov*, 436 U.S. at 256-259. Davis is being held personally liable notwithstanding his lack of personal fault, in violation of the principals enunciated by this Court in *Slodov*.

Furthermore, imposing an absolute requirement, to pay all funds acquired by the corporation to the IRS, on managers who learn after the fact that their corporation has not paid its taxes contravenes the purpose of the penalty statute. Rather than enhance tax collections, it will guarantee closure or bankruptcy of troubled corporations.

The petition for writ of certiorari should be granted so this Court can settle the conflict between the applicable statute as interpreted by this Court in *Slodov* and the several Courts of Appeals cases involving managers who belatedly learn of unpaid taxes. *Davis v. United States*, 961 F.2d 867 (9th Cir. 1992); *Honey v. United States*, 963 F.2d 1083; *Thibodeau v. United States*, 828 F.2d 1499; *Vespe v. United States*, 868 F.2d 1328; *Garsky v. United States*, 600 F.2d 86; *Kizzier v. United States*, 598 F.2d 1128; *Mazo v. United States*, 591 F.2d 1151. Managers of financially troubled corporations must be guided so they may make an informed choice.

The writ of certiorari should also be granted in order to resolve the conflict between the Ninth Circuit in this case and the Fifth Circuit in *Wilkes*, 946 F.2d 1143, concerning the effect of

payment on tax assessments, and because a clear mistake has been made in assessing Davis for taxes which were paid by ITAC.

Respectfully Submitted,

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December 30, 1992